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CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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Attorney General - - WALTER C. OWEN

Clerk - - - ARTHUR A. MCLEOD

MEMORANDUM.

Mr. Justice VINJE took no part in the decision of the cases reported in this volume on pages 97–163.

ERRATUM.

Page 365, line 28. For her death, read his death.

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CASES DETERMINED

AT THE

January Term, 1917.

GIMBEL and others, Appellants, vs. WEHR and another, Respondents.

WEHR and another, Appellants, vs. GIMBEL and others, Respondents.

October 27, 1916—January 16, 1917.

Motions: Order to show cause: Judgment: Relief against: Enforcement: Matters to be considered: Evidence: Easements: Right of way: "Practicable" alley: Encroachments.

1. An order to show cause is equivalent to a notice of motion, and the court proceeds thereon as upon a motion.
2. Relief against a judgment upon any ground can be had only pursuant to the Code procedure in the ways prescribed in sec. 2832, Stats., or by motion for new trial under sec. 2879, unless the facts are such as to warrant relief in a direct action to restrain a party from reaping the fruits of an unconscionable judgment.
3. In a proceeding under sec. 2966, Stats., to enforce a judgment which required the performance of an act other than the payment of money or delivery of property,—*i. e.* that an alley over certain land, twenty feet wide and eight feet high, should be "opened and made practicable,"—the court properly examined the pleadings in the action wherein such judgment was rendered, and also certain agreements referred to in the judgment, for the purpose of ascertaining its meaning and effect.
4. Where the specification in such judgment as to the width of the alley was, as shown by the record, not intended to be a determination that certain encroachments upon such width by walls, columns, etc., were unlawful, the court, in the proceeding to enforce the judgment, properly received and considered evidence as to the nature and extent of such encroachments and their effect on the use and practicability of the alley; and such evidence is *held* to support a finding that the encroachments with-

in the limits of the alley do not affect its practical usefulness nor invade the rights of abutting owners.

5. It further appearing that the grade of the alley is substantially as it was at the time of a certain agreement referred to in the judgment, and that any variation thereof would violate the right confirmed by such agreement, it is *held* that the order of the court fixing the grade as it now is correctly interprets the judgment.

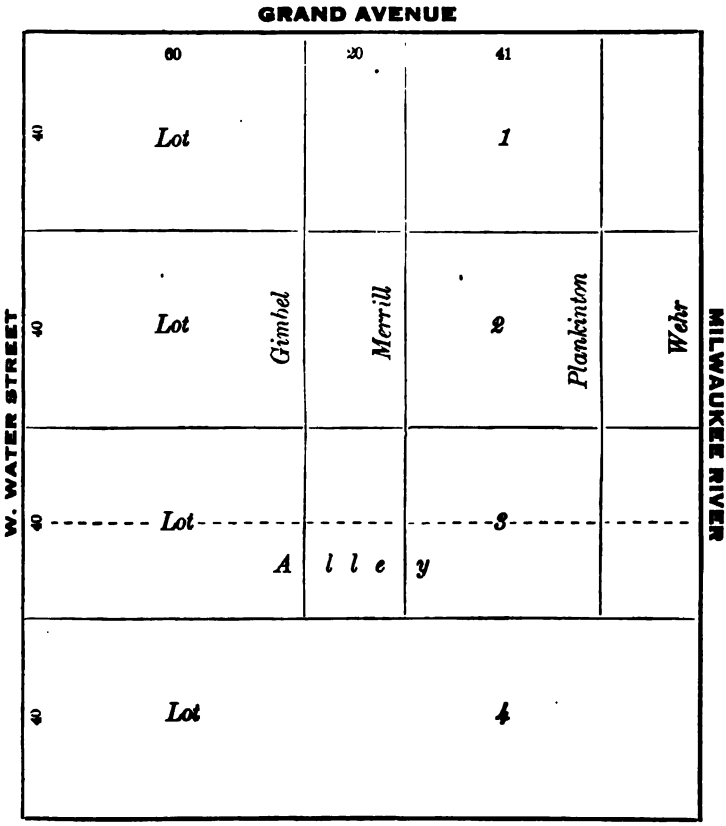
6. The owner of a right of way across the land of another, whether it was acquired by grant or by prescription, is entitled only to a reasonable and usual enjoyment thereof, in view of all the circumstances of the case and of the use then and theretofore made of the premises affected by it, and the owner of the soil is entitled to all the rights and benefits of ownership consistent with the easement.

APPEALS from two orders of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

This is a proceeding to enforce a judgment rendered by the circuit court for Milwaukee county January 17, 1906, in a consolidated action. The two orders appealed from are dated respectively May 22, 1916, and June 12, 1916.

The judgment in the consolidated action determines and adjudges that *Jacob, Isaac, Charles, Daniel, Ellis A., Louis S.,* and *Benjamin Gimbel* and *Nathan Hamburger,* as copartners under the name of Gimbel Brothers, and their successors and assigns are entitled to build on the west eighty feet of lots 1, 2, and 3 in block 72 of the Fourth ward, city of Milwaukee; that *Henry Wehr,* as owner of the northeast parcel of these lots, lying east of the west 121 feet thereof and adjoining the Milwaukee river, is entitled, as appurtenant to his land, to a passageway over the south twenty feet of lot 3 to West Water street, and that the owners of the remainder of these lots 1, 2, and 3 have the right to a passageway over that part of the south twenty feet of lot 3 owned by *Henry Wehr,* to the Milwaukee river; that *Henry Wehr* is entitled to have this passageway opened May 1, 1915; that *Henry Wehr* is entitled to have opened over the parcel of lot 3 (being the forty-one feet next west of *Wehr's* parcel),

owned by the trustees of John Plankinton, deceased, "an alley or passageway twenty (20) feet wide and eight (8) feet high," upon condition that an alley twenty feet wide and eight feet high be opened and maintained over *Wehr's* prop-



The above diagram may be of some help in understanding the situation.—REP.

erty to the river; that *Henry Wehr* "is also entitled to have opened and maintained the spaces or areas" on the Plankinton property, as "described in a certain agreement between John Plankinton and said *Henry Wehr* dated July 15,

1887," and recorded in the office of the register of deeds; that the Gimbel Brothers and the Plankinton trustees "are obligated to said *Henry Wehr,* to open such spaces or areas;" that *Henry Wehr* is entitled to have opened a passageway "eight (8) feet high and twenty (20) feet in width" from the Plankinton property to West Water street, upon condition that a passageway of the same width and height be opened and maintained over the *Wehr* property to the river; that Edward L. Merrill, his heirs and assigns, are entitled on May 1, 1915, to the opening of a passageway over the south twenty feet of lot 3 from West Water street to the river, upon condition that he or they open, for the benefit of the other owners of lot 3, a similar twenty-foot passageway over his part of the south twenty feet of lot 3: "The dimensions of such passageway to which said Edward L. Merrill, his heirs or assigns, are entitled are determined by the terms of the aforesaid agreement between Ira E. Goodall and Sherman M. Booth and wife."

Henry Wehr, defendant in the first and plaintiff in the second of the actions that were consolidated, petitioned the circuit court for an order that the parties to the consolidated action and others, who are made parties to this proceeding, show cause before the circuit court why they should not comply with the judgment of January 17, 1906, in the consolidated action by opening and maintaining the passageway or alley as determined in such judgment; and why those of them who are obligated to open and maintain such passageway or alley should not be punished as for contempt for failing to comply with such judgment.

The record shows who holds the title to the lots in question; the findings of fact and conclusions of law in the consolidated action, the Booth-Goodall agreement, the Plankinton-Wehr agreement, and the evidence taken on the hearing of this proceeding tending to show the conditions and uses of an alley by the owners of these premises in former years, the conditions and location of the structures abutting there-

on during such use, the condition of the passageway during the time it was closed; and the evidence adduced by the parties tending to show the width, the height, and the grade of the passageway as it now exists. There is also evidence of the present use of the passageway and evidence of tests made as to whether or not the passageway as it now exists is "opened and made practicable" within the calls of the judgment in the consolidated action. The conclusions of the court upon the trial of the question presented in this proceeding are embodied in the following orders of May 22, 1916, and June 12, 1916, from which these appeals are taken:

"It is ordered that the passageway through the so-called Gimbel building as made by the *Gimbel Brothers Company,* and tendered by them to the plaintiff and defendant *Wehr,* ought to be modified, in order to conform with the judgment entered and rendered herein on April 8, 1905, as follows, to wit:

"1. That the upward slope of said alley should commence at a point in said alley which shall be on the west line of the so-called Plankinton property.

"2. That the grade starting at that point shall be for the next west twenty (20) feet, that is to say, over the Merrill property, at such a slant as would bring it to the grade of West Water street as it was at the time of the entry of the judgment herein, that is to say, one and 39/100 (1.39) feet lower than the present grade of West Water street.

"3. The grade shall then proceed from the point and grade fixed in the preceding sentence on a uniform rise to the west line of the Gimbel building, that is to say, to a point at such height as shall be established and permitted by the city of Milwaukee in the sidewalk on said west line of the Gimbel property, being the permitted grade height in said sidewalk on said west line.

"4. From such west line of the Gimbel building it shall slope downward to the now established grade of said West Water street.

"5. That such passageway shall be at all points therein of a height of eight (8) feet in the clear from the floor of such passageway to the roof thereof.

"6. That the base of the column on the south side of the Plankinton property, which now projects a few inches into said passageway, shall be chipped off so as to be flush with the face of said column.

"7. That there need be no removal or change in the columns now standing partly on said passageway on the twenty-foot strip in question here, and which said columns support the Gimbel building.

"8. That there need be no change made in the walls now standing on the north and south portions of said twenty-foot strip over the Plankinton forty-one (41) feet.

"9. That the plaintiff and defendant *Henry Wehr* and the *Wehr Building Company* have the right to use a reasonable portion of said twenty-foot strip on the south side of the *Wehr* property to support any building that they or either of them may erect upon the said *Wehr* property, provided that the said opening on said twenty-foot strip shall be kept at least eight (8) feet in the clear above a grade substantially the same as now exists over the said twenty-foot strip on the Plankinton forty-one feet.

"10. That the *Gimbels* may close the said passageway at the east and west ends thereof upon the property owned or leased by them, provided, however, that said closing shall be with doors or gates so arranged and maintained that they shall in no wise interfere with the use and operation of said alley by the other adjacent owners.

"11. That all the changes herein provided for to be made in said alley west of the Plankinton property, and also as to the cutting of the base of the column on the Plankinton property, shall be at the expense and cost of the *Gimbels*.

"12. That any and all questions as to damages sustained by said *Henry Wehr* or the *Wehr Building Company* are expressly reserved (by agreement of the parties) and order of the court until further proceedings herein.

"13. That the changes in said alley in this order required shall be commenced by said *Gimbels* within twenty (20) days after service of notice of entry of this order upon them or their attorneys, and shall be prosecuted thereafter immediately and with all due speed, unless proceedings herein be stayed upon any appeal that may be taken to the supreme court.

"14. That upon compliance by said *Gimbels* with this

order, that the application to punish them, or any of them, as for a contempt will be denied.

"15. That the question of any costs in the present proceeding shall also abide further proceedings herein."

The second order is as follows:

"It is ordered by the court now here that the motion of *Henry Wehr* and *Wehr Building Company* that the order entered herein on May 22, 1916, be vacated and set aside and the proposed order, of which a copy is attached to the order to show cause herein dated June 9, 1916, be and the same is hereby denied."

In behalf of *Gimbel Brothers, Inc.,* and *Jacob Gimbel* and others there was a brief by *Glicksman, Gold & Corrigan* and *Thomas M. Kearney,* all of Milwaukee, and oral argument by *Mr. Kearney, Mr. Nathan Glicksman,* and *Mr. Walter D. Corrigan.*

For *Henry Wehr* and the *Wehr Building Company* there were briefs by *Kronshage, McGovern & Hannan* of Milwaukee, attorneys for *Henry Wehr,* and *Lines, Spooner, Ellis & Quarles* and *C. H. Van Alstine,* all of Milwaukee, attorneys for *Wehr Building Company;* and the cause was argued orally by *Mr. F. E. McGovern, Mr. Theo. Kronshage, Jr.,* and *Mr. L. A. Olwell,* for *Henry Wehr,* and *Mr. Geo. Lines* and *Mr. Van Alstine,* for the *Wehr Building Company.*

For the defendants *Upham* and *Miller,* as trustees under the will of John Plankinton, there was a brief by *Upham, Black, Russell & Richardson* of Milwaukee, and oral argument by *Wm. E. Black.*

SIEBECKER, J. This proceeding was commenced by the petition of *Henry Wehr* to enforce the judgment in the consolidated action entered January 17, 1906. The petitioner claims the right to enforce the judgment in this manner under the provisions of sec. 2966, Stats. 1915:

"Where a judgment requires the payment of money or the delivery of real or personal property the same may be enforced in those respects by execution as provided by law.

Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given or the person or officer who is required to obey the same, and if he refuse he may be punished by the court as for a contempt, and his obedience thereto enforced."

The object of the present proceeding is manifestly to enforce obedience to the court's judgment. It is a coercive proceeding for the performance of duties imposed by the judgment and which are now within the power of the alleged contemnors. The proceeding being one on order to show cause is equivalent to a notice of motion and the court proceeds as upon motion in the action. *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 79 N. W. 229; *Emerson v. Huss,* 127 Wis. 215, 106 N. W. 518. This makes the proceeding one of a civil nature, having for its immediate object protection of the rights of the petitioner as a party to the judgment. It can only be taken at the foot of the judgment in the court wherein the action is pending. It is, however, contended by the parties who oppose the petition that this proceeding is a bill to enforce the decree, or one in the nature of such a bill to make the judgment effective. The argument is therefore made that the doctrine of *res adjudicata* is not applicable to prevent the court from examining the case to ascertain whether or not the enforcement of the judgment would be equitable and just, and that if the court finds under existing conditions that inequity will be done by coercing performance of the duties prescribed in the judgment, the court will deny its assistance to execute the commands of the judgment. The Code procedure displaces the ancient practice for the enforcement of remedial rights and substitutes the procedure provided in the statutes. It is said in *Crowns v. Forest L. Co.* 102 Wis. 97, 100, 78 N. W. 433:

"The Code, therefore, cut off and wiped out many of the forms of procedure existing under the old practice, that had a tendency to delay or prolong litigation. . . . Within one

year after notice, the court might, in discretion, relieve a party from a judgment or other proceeding against him 'through his mistake, inadvertence, surprise, or excusable neglect,' and might supply omissions when the party had failed to conform to the law, and permit amendments to make the proceedings conformable thereto."

The grounds for relief from a judgment are there elaborately discussed and the conclusion reached that relief against judgments upon any ground can be had only pursuant to the Code procedure in the ways therein prescribed, as above stated, or by motion for a new trial within the period provided after verdict or findings or upon newly discovered evidence, and, if these remedies are not applicable, then there is no remedy within the power of the court that has rendered the judgment unless the facts and circumstances disclose a case for a direct action to restrain the party from reaping the fruits of an unconscionable judgment. Among the cases in this court treating this question are *Crowns v. Forest L. Co.* 102 Wis. 97, 78 N. W. 433; *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 79 N. W. 229; *Uecker v. Thiedt,* 133 Wis. 148, 113 N. W. 447; *Boring v. Ott,* 138 Wis. 260, 119 N. W. 865; *Zohrlaut v. Mengelberg,* 158 Wis. 392, 148 N. W. 314, 149 N. W. 280.

The judgment in this case is complete in its terms and declares the rights of the parties to the respective parcels of land in lots 1, 2, and 3 above described and those appurtenant thereto. It is adjudged that the owners thereof have the right to an alley or passageway over the south twenty feet of lot 3, extending from the river to West Water street. Paragraph 3 of the judgment declares: "That said *Henry Wehr* is entitled to have such passageway opened and made practicable." Paragraph 4 provides that over the forty-one foot wide parcel adjoining the *Wehr* property on the west shall be opened an alley "twenty (20) feet wide and eight (8) feet high; on the express condition, however, that simultaneously therewith an alley or passageway twenty (20) feet

wide and eight (8) feet high be opened and maintained" over *Wehr's* property, "extending east to the Milwaukee river." By paragraph 5 it is adjudged that *Henry Wehr* is entitled, upon the opening of this alley, "to have opened and maintained the spaces or areas" on the Plankinton estate property "described in a certain agreement between John Plankinton and said *Henry Wehr,* dated July 15, 1887." It is also adjudged that Gimbel Brothers and the Plankinton estate are obligated to *Wehr* "to open such spaces or areas." Paragraph 6 declares *Wehr* is entitled to have opened and maintained the alley over the west eighty feet of lot 3 "eight (8) feet high and twenty (20) feet wide." By paragraph 7 the Gimbel Brothers are directed to open the alley May 1, 1915, and in case they fail to do so they are to pay to *Wehr,* his heirs or assigns, the necessary expense of opening and restoring the alley as provided in the judgment. By paragraph 8 it is declared that Edward L. Merrill, his heirs and assigns, are entitled to the opening of this alley upon condition that he or they open the alley over their property for the other owners of land over which it passes. "The dimensions of such passageway to which said Edward L. Merrill, his heirs and assigns, are entitled are determined by the terms of the aforesaid agreement between Ira E. Goodall and Sherman M. Booth and wife."

The parties to this proceeding are involved in a dispute as to the effect of this judgment and to what extent a court may properly examine the records in the action to interpret its terms and ascertain its exact meaning. The judgment in terms refers to the Goodall-Booth and the Plankinton-Wehr agreements and hence necessarily requires examination thereof to ascertain what is meant by the determination resting thereon. The court may also properly look into the issues raised by the pleadings and the admitted facts therein and the court's findings to enable the court to interpret the terms of the judgment in the light thereof in order to ascertain its meaning and effect. *Lardner v. Williams,* 98 Wis.

514, 74 N. W. 346; *Grunert v. Spalding,* 104 Wis. 193, 80 N. W. 589. This court in *Gerbig v. Bell,* 143 Wis. 157 (126 N. W. 871), on page 162 declared:

"The ascertainment of what questions have been litigated in an action presents pure questions of fact which are not necessarily established by the pleadings and judgment, but which may be shown by the findings of the court or a referee, by the verdict, by the bill of exceptions, or by extrinsic evidence, as well as by the pleadings and judgment."

We think the trial court in this proceeding very properly looked into the pleadings of the parties, the findings of the court, and the Goodall-Booth and Plankinton-Wehr agreements, and in the light thereof interpreted the terms of this judgment in order to ascertain its meaning and effect.

In the decision by the trial court in this proceeding the court specifies with particularity and *in extenso* the conveyances of the different parcels of land, the facts of the pleadings in the action and the contracts as exhibited thereto, which he examined to ascertain the rights of the parties and to determine what encroachments actually existed upon the alleged right of way or alley, consisting of walls, piers, and structures connected with buildings abutting on the alley. The court also examined the findings of fact made by the court on which the judgment rests. Repetition of these matters at this time would result in an extension of many pages and be of no useful service. Upon a full consideration thereof the trial court held:

"That the main question litigated was whether or no the building on the west twenty feet might be constructed and remain there, closing the alley during the period of the Wehr-Gimbel lease, and secondly, whether or not *Wehr* had lost his right to such passageway in any manner."

The court also held in the light of the record in the case and the terms of the judgment that:

"*Mr. Wehr* had not lost his right of passageway; that the action of the parties concerned under the Booth-Goodall agree-

ment and the Plankinton-Wehr agreement had been to reduce the alley from one open to the sky to one eight feet in the clear, . . . and . . . that the court did not determine that this alley or passageway was to be twenty feet in the clear its entire length, and . . . that the narrowing of the passage between the Plankinton buildings constituted no unlawful encroachment on the right of way, nor that the wall on the south end of the *Wehr* property was an unlawful encroachment, . . . nor that the columns supporting the Gimbel building . . . were an unlawful encroachment."

These conclusions are well supported by the terms of the judgment and the facts disclosed in the record. The matters disclosed by the record resulting in the judgment of the consolidated action do not show that the terms of the judgment specifying the width of the alley as twenty feet were intended to be a specific determination that these encroachments on the twenty-foot limits were held to be unlawful encroachments. It therefore devolved on the trial court to hold an inquest on this issue between the parties. Much evidence was adduced on the hearing of this issue showing the extent and nature of these encroachments and their effect on the use and practicability of the alley. The result of the trial of the question is embodied in the following part of the trial court's decision:

"I find no evidence presented on this hearing that would satisfy this court that the lessening at certain points in this alley by reason of the encroachments mentioned are such as of themselves make the alley less practicable."

The facts before the court clearly sustain this conclusion. It appears that the abutting owners on the alley found no inconvenience from these encroachments in the use of the alley and that they acquiesced and permitted their continued existence throughout a long period of time. This conclusion is also supported by the agreements of the parties dealing with the existence of the alley. The court's determination (1) "That the base of the column on the south side of the Plankinton property . . . shall be chipped off so as to be

flush with the face of said column;" (2) that the columns supporting the Gimbel building partly within the limits of the alley are to remain without a change; (3) that the walls in the Plankinton property on the north and south sides of the alley are to remain; and (4) that *Wehr* has the right to use a reasonable portion of the alley on the south side of the *Wehr* property for support of a building on such property, provided that the alley shall be eight feet in the clear above the grade therein, which is substantially the same as the grade on the adjoining Plankinton property, must be affirmed. The evidence amply supports the finding that such encroachments within the limits of the alley do not affect its practical usefulness and that they do not invade the right of abutting owners. The judgment expressly determines the right of abutters to build over the alley, leaving a covered way of eight feet in the clear. This is of much weight to sustain the court's conclusions that the supports of the buildings as they have existed within the margins of the alley were deemed by the abutting owners as necessary and reasonable and so recognized in their agreements and grants in respect thereto. Under the facts and circumstances of the case the rights in controversy between the parties are governed by the principles declared in the case of *Dyer v. Walker,* 99 Wis. 404, 75 N. W. 79, and the cases in this court there referred to. As stated in the syllabus of the case it was there held:

"The owner of a right of way across the land of another, whether it was acquired by grant or by prescription, is entitled only to a reasonable and usual enjoyment thereof, in view of all the circumstances of the case and of the use then and theretofore made of the premises affected by it, and the owner of the soil is entitled to all the rights and benefits of ownership consistent with the easement."

The determination in the judgment that *Wehr* "is entitled to have such passageway opened and made practicable" involves an inquiry into the use of the alley as it had

theretofore existed in relation to the structures abutting thereon and the natural slope of the ground from West Water street to the river. The court found "that the level of the alley on Plankinton's forty-one feet at the time of the Plankinton-Wehr agreement in 1887 was, and ever since has been, the same substantially as it is now." The weight of the evidence preponderates in favor of this conclusion and hence the finding must stand. This fact establishes the right of the successors of Plankinton to use the space over the alley except the eight feet in the clear from the surface of this grade, and hence the original grade over this property cannot be varied. Any variation of this grade would violate the right confirmed in the Plankinton-Wehr agreement. Under this condition the slope, from the west line of the Plankinton property to West Water street to make the passageway "practicable" as directed in the judgment, had to be ascertained in the light of the adjudication in the judgment that "*Wehr* is entitled to have such passageway opened and made practicable." An inspection of the location and length of the alley between the street and the Plankinton property, in the light of the grade and the uses to which the alley was and is to be devoted, shows clearly that the grade established in the court's order meets these terms and conditions of the judgment. We are of the opinion that the order of the court correctly interprets the judgment, that the width of the alley established thereby is not unlawfully encroached upon by the structures on the abutting property, and that the grade of the alley as fixed in the order meets the calls of the judgment directing it to be "opened and made practicable."

The direction obligating "the *Gimbels*" to maintain such gates, if any, in the east and west ends of their property to close the alley, which must not interfere with the use of the alley by others, is not seriously contested and will no doubt be properly complied with.

By the Court.—The orders appealed from are affirmed on

both appeals, and the cause remanded for further proceedings according to law. No costs are allowed to either party. The appellant *Henry Wehr* to pay the clerk's fees in this court.

ESCHWEILER, J., took no part.

LOMMEN, Appellant, vs. DANAHER, Respondent.

November 14, 1916—January 16, 1917.

Vendor and purchaser of land: Breach of contract by vendor: Measure of damages: Exchange of properties: Stated values, when not binding.

1. Where the vendor fails to perform an executory land contract, having agreed to do what he had no right to do, taking his chances upon being able to acquire such right, he is guilty of a species of bad faith and is liable to make good to the opposite party the damages caused to him by the loss of his bargain.
2. Defendant contracted to sell to plaintiff certain lands to which he did not have full title, for a consideration of $66,500 to be paid partly in money and partly by a stock of merchandise and store fixtures and certain real estate subject to incumbrances. The contract provided that "the value of the equities in the real estate and personal property as reckoned in this transaction is $44,500, which leaves a balance of $22,000 due to" defendant; and a date was fixed when "the exchange of properties" was to be made. Defendant was unable to obtain the title necessary to carry out his agreement. *Held*, that as damages for such breach plaintiff was entitled to recover the full value of his bargain.
3. The measure of the damages in such case is the difference between the fair market value, at the time of the breach, of plaintiff's equities in the property he was to transfer to defendant, and the like value at such time of the lands defendant was to convey, less the $22,000 which was to be paid in money, and interest upon said difference from the time of the breach.
4. The values stated in the contract, not having been specified or intended as fixing the actual values of the respective properties, but as a mere trading basis, were not binding on the parties in respect to damages for the breach of the contract.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Reversed.*

Action for damages for breach of contract.

Plaintiff made a land contract with defendant whereby the latter promised to sell the former a number of tracts of Montana land "for the consideration of $66,500," plaintiff to pay therefor by a stock of merchandise and store fixtures, located in a store building in Caledonia, Minnesota, the merchandise being inventoried at $5,000 and fixtures at $2,500, also some other personal property and some equities in real estate, such real estate to be taken subject to mortgage indebtedness of $13,500, and the balance as thus indicated:

"The value of the equities in the real estate and personal property, as reckoned in this transaction, is forty-four thousand five hundred dollars ($44,500) which leaves a balance of $22,000 due to *T. F. Danaher* on the lands in Yellowstone county, Montana, above described, which amount of $22,000 will be paid in ten annual equal payments of two thousand dollars ($2,000) each, said deferred payments to bear interest at the rate of six per cent. per annum payable annually."

Defendant agreed as to his title and right to convey the Montana lands as follows:

"It is understood and agreed that the title to the lands in Yellowstone county, Montana, is Northern Pacific contracts; that a letter from the Northern Pacific Railway Company will be furnished as evidence that *T. F. Danaher* has good right to sell the same. Release of said lands in Yellowstone county, Montana, to be made on units of one section, the price of release to depend upon the grade of land, to be not less than one dollar and a half ($1.50) and not more than three and one half ($3.50) per acre."

The contract contained other provisions, not material to be stated here, and a stipulation that "the exchange of properties" should be made May 27, 1913.

Plaintiff was ready in due time to perform on his part and

duly tendered performance. He put defendant in possession of the merchandise and store fixtures. Defendant failed to produce such a letter from the railway company as agreed upon. His contracts with the company, six in number, covered other than the particular land and he had no right to assign them or sell any of the land without consent of the company. He could not get a deed of any of the land in any one contract without paying for all land covered thereby. The attitude of the company was such that he could not carry out his agreement with plaintiff. The latter would not accept anything other than full performance and defendant therefore declared the deal off and surrendered back possession of the stock of merchandise and store fixtures which had been retained by him for about ten days. Plaintiff claimed, as general damages, for the breach of contract, compensation for the loss of his bargain to be computed by deducting from the market value of the Montana lands at the time of the breach the aggregate of such value at such time of the property he agreed to transfer to defendant and the $22,000, less the incumbrances on the property of $13,500, with interest on the balance from such time.

There was a claim for special damages in respect to the store stock and business and to support that plaintiff was asked, when testifying in his own behalf, how the closing down of the store affected the value of the stock. Upon objection being made thereto as not bearing on the proper measure of damages, it was sustained after plaintiff stated that he did not resume the store business for one year because when he sold out he could not buy goods and did not have any money to do so.

There was evidence respecting the general damages claimed by plaintiff to the effect that the market value of the Montana land at the time of the breach was $55,000 and of plaintiff's property $31,750. The jury found accordingly.

A motion was made in plaintiff's behalf for judgment for $14,750 with interest and costs, the amount being determined according to his claim as aforesaid, that is by adding to the $31,750 the $22,000 which was agreed to be paid in money, deducting therefrom the $13,500 of incumbrances on plaintiff's property, and deducting the balance from the value of the Montana land as found by the jury. The motion was denied. Then a motion was made in plaintiff's behalf for an order setting aside the verdict and granting a new trial upon the ground, among others, of error in rejecting the evidence before indicated. That was denied. Judgment was then awarded defendant upon the theory that the parties stipulated in the contract to the values of the respective properties and were mutually bound thereby and, therefore, since plaintiff kept his property he was not damaged by not being able to obtain the agreed equivalent from defendant.

For the appellant there was a brief by *Lees & Bunge* of La Crosse, and oral argument by *George W. Bunge.*

For the respondent there was a brief by *White & Skogmo* of River Falls and *Christofferson & Christofferson* of St. Paul, Minnesota, and oral argument by *F. M. White.*

MARSHALL, J. It appears from the foregoing that the contract between the parties was wholly executory on the part of respondent at the time he rescinded it because he was unable to strictly perform as he agreed and appellant would not accept any modified performance. The latter was wholly without fault and, though he received back the stock of merchandise and store fixtures, he insisted upon the benefit of his bargain. The trial court, notwithstanding the loss of such bargain prevented appellant from making a gain, according to the verdict of the jury, of $14,750, held that he was not entitled to recover anything. It is of that appellant mainly complains, insisting that the ordinary rule for the determination of damages for breach of contract applies.

It cannot be questioned but that, in general, if two persons enter into a contract and one breaches it, the other is entitled to full compensation for the loss of his bargain to be computed by the settled rule that the damages must be reasonably certain,—not speculative, and extend to the natural and proximate consequences of the wrong, and so must be fairly and reasonably considered as arising in the natural course of things from the breach and to be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it. *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119; *Anderson v. Savoy,* 137 Wis. 44, 48, 118 N. W. 217; *Altschuler v. A., T. & S. F. R. Co.* 155 Wis. 146, 153, 144 N. W. 294. Why is that rule not applicable to this case? The trial court held that it was not, within the doctrine of *Nash v. Hoxie,* 59 Wis. 384, 18 N. W. 408, and, particularly, the rule stated in *Fagan v. Hook,* 134 Iowa, 381, 391, 105 N. W. 155, 111 N. W. 981, in these words:

"If parties definitely settle upon and agree to the value of their respective properties for the purpose of sale one to the other, no inquiry concerning actual values is permissible, as these are put beyond question by their having determined the worth thereof for themselves, and thereby fixed the measure of damages in event of a breach. If, on the other hand, the agreement is a mere trading contract, by the terms of which one party is to exchange certain property belonging to him for that of the other upon or by the payment of the difference, and to this end and for the purpose solely of accomplishing this result, but not to ascertain their actual values, estimates are placed on the respective properties, then neither party is bound by the values so estimated, and the measure of damages to be applied is that of *quantum meruit.* In other words, the values designated in the agreement to be binding on the parties must appear to have been specified as such, and not as merely incidental to some other purpose not involving the intention of deciding the true worth. The criterion in determining whether there has been a sale or exchange of per-

sonal property is whether there is a fixed price at which the things are to be exchanged. If there is such fixed price, the transaction is a sale; but, if there is not, the transaction is an exchange."

Did the parties here, within the doctrine of *Nash v. Hoxie,* 59 Wis. 384, 18 N. W. 408, and the Iowa case, mutually agree upon the real value of their respective properties at the time the contract was entered into? The trial court, as indicated, resolved that in the affirmative and so held that the ordinary rule of damages did not apply; that plaintiff was bound by such mutual agreement, and, as he retained all his property and was relieved from the obligation to pay the $22,000, he was not damaged by reason of not being able to obtain for such property and the $22,000, the agreed equivalent.

It seems that, by the logic of the rule the court relied on, the transaction in question was a trading agreement, in the nature of a land contract, by the terms of which one party was to sell or exchange certain property, belonging to him, for that of the other and a difference in money and, in the language quoted, "to this end and for the purpose solely of accomplishing this result, but not to ascertain their actual values," prices were placed on the respective properties; and so, as said, neither party was bound by such values in respect to damages for the breach of contract. In order to take this case out of the ordinary rule for recoverable damages, the evidence should be pretty clear and satisfactory that it does not apply by reason of the parties, in effect, having stipulated that it should not. That is the logic of the doctrine upon which the trial court relied. "The values designated in the agreement to be binding on the parties must appear to have been specified as such, and not incidental to some other purposes not involving the intention of deciding the true worth."

There is no satisfactory indication that the amounts stated in the writing were specified as actual values. As to re-

spondent's property, nothing was said about its value; there was the mere contract selling price as in any ordinary land contract or a deed. As to appellant's property, it was recited that the value was $44,500 "as reckoned in this transaction." That language, pretty plainly, indicated the value stated was for a mere trading basis and not with any thought of making a binding agreement as to the real market value of the property.

In *Robbins v. Selby,* 144 Iowa, 407, 121 N. W. 674, 122 N. W. 954, where the doctrine of *Fagan v. Hook* was referred to, there were prices mentioned in the contract, very much as here, and it was held, under all the circumstances characterizing the transaction, which were proper to be considered in construing the writing, that the contracting parties did not purpose making a binding agreement as to the real worth of their respective properties.

If the contract here fails to clearly indicate that the parties did not intend to agree upon the real worth of their respective properties, and it seems that such is the situation, it, at the best for respondent, is ambiguous in respect to the matter, warranting the court in looking to characterizing circumstances in determining the real meaning. There are several such circumstances, the most significant being that neither party claimed that the real value of his property was that stated in the contract. Such values were so largely less than the prices stated in the writing as to strongly negative the idea that there was a definite purpose to agree upon such prices as such values,—that the minds of the parties never met on that subject.

So the doctrine of *Fagan v. Hook* does not support the decision complained of, but rather the contrary.

Further, as indicated in *Norton v. Hinecker,* 137 Iowa, 751, 115 N. W. 612, a distinction is to be recognized between an action for the value of the property agreed to be transferred and an action for damages where the contract has

been, while executory, wrongfully rescinded, then the damages for the breach are to be determined, not on the basis of "the trading value put upon the properties, but by the actual value of such properties from which it might be ascertained what plaintiff's real loss, in being deprived of the benefit of the contract, actually was."

In reaching a conclusion, we have not found it necessary to deal with the many authorities cited to our attention treating of the technical distinction between a sale and an exchange of properties. There was neither, completed here. There was an executory contract on the part of respondent to sell or exchange his real estate for other property and a balance in money, a mere price being placed on the properties for the purpose of the transaction, without any agreement as to actual values. Each had his selling price, and evidently purposed obtaining more than he parted with, to make a profitable bargain. They, practically, made a land contract in which each stated his price and it was met on a trading basis.

In case of an executory land contract, and it is not perceived why, upon principle or on authority, the agreement in question should not be so classed, where the executory seller fails to perform, having agreed to do what he had no right to do, taking his chances upon being able to acquire such right, he is guilty of a species of bad faith, and, if not in an ordinary case of breach of such a contract, he is liable to make good to the opposite party the damages caused to him by the loss of his bargain. *Arentsen v. Moreland,* 122 Wis. 167, 99 N. W. 790; *Muenchow v. Roberts,* 77 Wis. 520, 46 N. W. 802; *Maxon v. Gates,* 136 Wis. 270, 116 N. W. 758; *McLennan v. Church,* 163 Wis. 411, 158 N. W. 73.

In the last case cited, it is said that, "ordinarily, the damages recoverable for breach of a land contract by failing to convey, over and above payments made, is the difference between the contract price and the market value at the time of the breach, with interest to the date of the judgment."

In *Muenchow v. Roberts* it was said: "The plaintiff is entitled to recover, if at all, the value of his bargain. The true measure of such value is the value of the land the defendant contracted to sell to him, estimated at the time the contract was broken, less what the plaintiff agreed to pay therefor." That rule, as before indicated, applies wherever the contract breached is characterized by any species of bad faith, even such as an agreement to sell land which the vendor has no title to, or sell without present right to convey, depending upon subsequently acquiring such right. A full discussion of the subject will be found in *Arentsen v. Moreland, supra.*

Applying the foregoing to the situation here, it seems that the trial court erred in denying relief to the appellant. He was entitled to the full benefit of his bargain. That requires the difference between the fair market value, at the time of the breach, of the property he was to sell respondent, less the incumbrances thereon, and the like value at such time of the Montana land less the $22,000, which was to be paid in money, and interest from the time of such breach. That is in accordance with appellant's motion for judgment on the verdict of the jury.

The result stated renders unnecessary consideration of the question of whether error was committed to appellant's prejudice in refusing to grant a new trial. The motion in respect thereto was an alternative. Had the court granted the motion for judgment, the result would have been a waiver of any errors against appellant in respect to the rejection of evidence which was the subject of the motion for a new trial.

By the Court.—The judgment is reversed, and the cause remanded for judgment in plaintiff's favor in accordance with this opinion.

SIEBECKER, J., dissents.

GLASHEEN, Respondent, vs. WISCONSIN TRACTION, LIGHT, HEAT & POWER COMPANY, Appellant.

December 6, 1916—January 16, 1917.

Street and interurban railways: Injury to passenger in alighting: Findings of fact: Evidence: Sufficiency: Competency: Testimony of physician: Subjective symptoms: Insufficient objection: Excessive damages.

1. In an action for injuries sustained while alighting from an interurban electric car, a finding by the jury that plaintiff was injured by striking his back against a post on alighting from the car is *held* not contrary to all reasonable probabilities, in view of the evidence and the fact that two juries have so found and two trial judges approved such finding.
2. After plaintiff had testified that he visited a physician for treatment and not with a view of using him as a witness, *it seems* that testimony of the physician as to what symptoms plaintiff complained of when he called for treatment was not objectionable. In any event, an objection to the physician's testimony before plaintiff had stated the purpose of his visit, sustained at that time but not renewed after plaintiff had made such statement, was not sufficient.
3. Upon evidence tending to show that plaintiff sustained serious injuries resulting in traumatic neurasthenia, that he lost considerable in weight and was made very nervous, affected with headache, loss of appetite, and suffered much decreased earning power, an award of $1,300, approved by the trial court, is *held* not so excessive as to warrant interference therewith on appeal.

APPEAL from a judgment of the circuit court for Outagamie county: EDGAR V. WERNER, Circuit Judge. *Affirmed.*

Action to recover for a personal injury.

The claim of plaintiff was that May 4, 1914, he was a passenger on one of defendant's interurban electric cars destined for Kimberly, Wisconsin; that upon the car arriving there and coming to a stop for the purpose of taking on and discharging passengers, he attempted to alight; that while endeavoring, with due care, to take the last step, the conductor, with knowledge of his situation, negligently caused

the car to suddenly start, whereby he was thrown off and against a post, severely injuring him.

The claim of the defendant was that plaintiff did not start to leave the car until it was in motion and that he then, carelessly and without fault of defendant, stepped off the same; and that he neither fell nor was thrown off the car, nor was injured by negligence of defendant or by colliding with a post.

There were two trials. On the first the jury found all issues in favor of plaintiff and assessed his damages at $1,500. The verdict was set aside upon the ground, that, though there was evidence, probably warranting a finding that plaintiff collided with a post by being thrown off the car as claimed, or by losing his balance and falling off, the evidence did not warrant the belief that he received any serious injury.

On the second trial, on evidence such as was presented before and additional evidence, the jury found, in effect, this: 1. Plaintiff was injured by striking his back against a post on alighting from the car. 2. The car was suddenly started while he was about to take the last step. 3. By reason thereof he was thrown against a post. 4. Defendant's servants did not exercise the highest degree of care reasonably to be expected in view of the character of the conveyance and the business. 5. Such failure produced the injury to plaintiff as a natural and probable result under the attending circumstances. 6. Such servants, as persons of ordinary care and prudence, ought to have reasonably foreseen that a personal injury to another might probably result from their conduct. 7. Plaintiff was not guilty of want of ordinary care proximately contributing to his injury. 9. It will take $1,300 to compensate him for his injury.

Judgment was rendered on such verdict in plaintiff's favor.

The cause was submitted for the appellant on the brief of *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and

for the respondent on that of *Minahan & Minahan* of Green Bay.

MARSHALL, J. Is the finding that respondent was injured by striking his back against a post contrary to all reasonable probabilities? Appellant's counsel so insists.

It is considered otherwise. The location of the post, the direction respondent was facing when he was caused to suddenly part from the car, the direction it moved at the instant, and other circumstances shown by the evidence, as the jury may properly have viewed it, render the claim of respondent, as to his colliding with a post, quite within the realms of probability. Two juries have so found and two circuit judges have affirmed the findings.

Several questions put to a doctor as to what symptoms respondent complained of when he called for treatment were successfully objected to. Then respondent was examined to show that his visit was for treatment and not with a view of using the doctor as a witness. Then the latter was recalled and asked to relate what respondent said to him at the time of the consultation, and answer was given without objection. It is contended that error was committed by permitting such answer. It does not seem that the evidence was objectionable under the rule that subjective symptoms brought to the attention of a doctor by a patient when he is being consulted in whole, or in part, for the purpose of using him as a witness by such patient cannot be shown; but it is a sufficient answer here that the particular question was not objected to. The situation was quite different when it was asked from that when the previous questions were put; so it would not be considered as covered by the objection thereto. The rule in *Whitney v. Traynor,* 74 Wis. 289, 42 N. W. 267, and similar cases does not apply.

Some objections were made to instructions which have been examined with the result that, if there were inaccura-

cies, or some part of the instructions was not strictly applicable to the situation,—and neither satisfactorily appears,—it is not affirmatively shown that appellant was or may probably have been prejudiced thereby.

The further claim is made that the verdict is excessive. As indicated in the statement, two juries have passed upon the matter. The first verdict of $1,500 was thought to be unwarranted for reasons which were quite fully met on the second trial, as the circuit judge and the jury thought. There certainly was evidence tending to prove that respondent was quite seriously injured; that his trouble was traumatic neurasthenia; that such a condition might probably result from such an occurrence as happened; that he lost considerable in weight and was made very nervous, affected with headache, loss of appetite, and suffered much decreased earning power. On the whole it does not seem that the damages are so clearly unreasonable that we would be justified in overruling the judgment of the trial court approving the verdict. The difficulty with which respondent was afflicted was of such a nature that his personal appearance, probably, materially aided the court and jury in determining the matter.

By the Court.—The judgment is affirmed.

RAU and wife, Respondents, vs. FREUND, Appellant.

December 6, 1916—January 16, 1917.

Plats of land: Validity: Streets: Dedication: Reference to plat in conveyance: Estoppel: Intent.

1. Where a plat made by the owner of land and recorded, but not signed or acknowledged by any one, covered also an adjoining tract the owners of which never assented to or adopted it as a plat of their land, it did not constitute a grant or dedication of a strip marked thereon as a street in said adjoining tract.
2. A plat not entitled to record may be referred to, in conveying the real estate it embraces, for the purposes of description and

identification; but such a reference does not of itself make the plat operative as a statutory dedication of a strip indicated thereon as a street.

3. Plaintiff conveyed to defendant a parcel of land by metes and bounds, starting at a point designated on an "assessor's plat" as a lot corner. An adjoining strip was not designated on that plat by name as a street, although it had been so designated on an invalid plat not made by plaintiff, and the city had never accepted it as a street but had treated and assessed it as plaintiff's private property. Defendant did not, at the time, understand that such strip was a street, and he afterwards bought a part of it from plaintiff. *Held*, that there was no dedication by plaintiff of the strip for a street by way of an estoppel *in pais*.

4. To constitute a dedication of land as a street by way of an estoppel *in pais* it is essential that the donor should intend to set the land apart for the benefit of the public.

APPEAL from a judgment of the municipal court of Outagamie county: ALBERT M. SPENCER, Judge. *Affirmed.*

This is an action to enjoin a continuing trespass on a tract of land in the city of Seymour and to recover damages for such alleged trespass.

The strip of land here in question was owned, prior to March, 1874, by one Cyrus Reed, who deeded it, as a part of a six-acre tract, to one Mitchell at that time. In 1892 Mitchell sold and conveyed the six acres to the plaintiffs, describing it by metes and bounds, the description being the same as that in the deed from Reed to Mitchell. After Reed had sold this land to Mitchell he made a plat of another tract of land and included in such plat the six-acre tract theretofore sold to Mitchell. This plat was recorded, but was not signed by any one. The strip in question was designated in such plat as "Mitchell street." A second plat was made by the city of Seymour pursuant to ch. 57, Laws 1887. This was a resurvey of the land as platted by Reed and conformed to the Reed plat, but did not call the strip here involved "Mitchell street." In 1894 the plaintiffs herein conveyed a tract of land to the defendant which lies adjacent to and south

of this so-called "Mitchell street." This land was described by metes and bounds, starting at a point of a lot as platted by Reed. In 1898 the defendant purchased more land from the plaintiffs, and in 1908 plaintiffs conveyed a small parcel of this "Mitchell street" strip, 11 feet wide and 180 feet deep, to defendant, adjoining the property then owned by him. The defendant claims that he at this time made an agreement with *George Rau,* one of the plaintiffs, for an easement for ingress and egress to and from his barn, which fronted on what he claimed to be "Mitchell street." This claim of an easement over "Mitchell street" is denied by the plaintiffs, as is also the claim that this strip of land was ever dedicated as a street. In all of these conveyances by plaintiffs to defendant the only plat referred to was the "assessor's plat of the city of Seymour."

The municipal court awarded judgment enjoining defendant, his agents and servants, from trespassing upon this strip of land and that the title to this strip of land is in *Angeline Rau.* From such judgment this appeal is taken.

For the appellant there was a brief by *Cady & Strehlow* of Green Bay, and oral argument by *Samuel H. Cady.*

For the respondents there was a brief by *Martin, Martin & Martin* of Green Bay, and oral argument by *P. H. Martin.*

SIEBECKER, J. The defendant justifies his acts of alleged trespasses on the strip of land in question upon the ground that it is a public street in the city of Seymour. The plaintiffs claim that the strip is not a street and that it is not subject to any easement whatsoever. Plaintiffs allege ownership of the strip and that they are entitled to the possession thereof to the exclusion of the defendant and all other persons. The defendant denies these claims and alleges that the strip was platted as a public street, and if no public street exists he claims to have acquired the right to use the same as a

passageway for ingress and egress in connection with his adjoining property. There is no record proof of granting defendant a right entitling him to use this strip as a passageway for ingress and egress, nor does the evidence show that defendant has in any way become vested with such a right. The trial court correctly found that the evidence wholly fails to show that the defendant has acquired the right of a private passageway over this strip.

The claim that this strip is a public street is based on the grounds that the owners thereof dedicated it as a street by the statutory platting of the tract of which it is a part and by the acts of the owners by operation of law. It appears that one Cyrus Reed sold a six-acre tract, including this strip, to Mitchell and Stewart in August, 1873, and deeded the same to Mitchell in March, 1874, describing it by metes and bounds as a part of the southeast quarter of the southeast quarter of section 29 of town 24. Mitchell and wife conveyed it by the same description to *George Rau* in October, 1892. It also appears that Cyrus Reed, after having deeded this six-acre tract to Mitchell, included it in a plat with another tract and caused the strip here in dispute to be outlined and designated on such plat as "Mitchell street." This private plat was recorded, but was not signed or acknowledged by any one. The owners of this six-acre tract at no time assented to or adopted such plat as a plat of their tract. Under these facts and circumstances the plat never became a valid plat of the ground, and the inclusion of this six-acre tract in such plat is wholly ineffectual to divide it into blocks, lots, and streets, under secs. 2260–2264, Stats. It necessarily results that the pretended plat did not constitute a grant of the strip in question as and for a street. *Van Valkenburgh v. Milwaukee,* 30 Wis. 338; *Emmons v. Milwaukee,* 32 Wis. 434; *Fleischfresser v. Schmidt,* 41 Wis. 223; *University of Our Lady of the Sacred Heart v. Watertown,* 150 Wis. 505, 137 N. W. 754.

The defendant further claims that the plaintiffs are bound by the plat of Seymour as exemplified by the Reed plat and a copy thereof called the "Assessor's plat," which was made and recorded by the city of Seymour. It is well recognized that a plat not entitled to record may be referred to in conveying the real estate it embraces for the purposes of description and identification of the land conveyed. Such a reference does not of itself make the plat operative as a statutory dedication of such a strip as a street. The inquiry then is, Did plaintiffs estop themselves as against the defendant from denying the strip in question to be a public street? It must be noted that the description in defendant's deed conveying to him a parcel of land in this plat is one by metes and bounds, starting at a point designated on the plat as a lot corner. It also appears that the assessor's plat does not designate the strip by name as a street and that the city at no time accepted it as a street, but treated the strip as the private property of plaintiffs and assessed it as plaintiffs' private property. The evidence sustains the court's finding that defendant at the time he purchased from plaintiffs did not understand that this strip was a public street and that he thereafter treated it as the private property of the plaintiffs by purchasing an eleven-foot strip thereof from plaintiffs for a valuable consideration and that he treated this eleven-foot strip as his private property. These facts and circumstances clearly refute all claims that plaintiffs expressly dedicated this strip to a public use and refute the inference that plaintiffs by their acts and conduct intended that such strip was apportioned for a street. We are persuaded that the trial court correctly determined these issues of fact and that they fail to show a dedication by plaintiffs of the strip for a street by way of an estoppel *in pais*. To constitute such dedication "It is essential that the donor should intend to set the land apart for the benefit of the public, for it is held, without contrariety of opinion, that there can be no dedication unless

there is present the intent to appropriate the land to the public use." 1 Elliott, Roads & S. (3d ed.) § 138.

It is clear that the defendant acquired no right to use this strip as a street or as a private passageway.

By the Court.—The judgment appealed from is affirmed.

OUTAGAMIE COUNTY, Respondent, vs. ZUEHLKE, Appellant.

December 6, 1916—January 16, 1917.

Constitutional law: Legislative power: Counties: Authority to engage in abstract business: Uniformity in county government: "Corporate powers:" Special acts: Repeal: Register of deeds: Refusal to turn over fees to county: Estoppel: Officers: Compensation.

1. The state constitution not being so much a grant as a limitation of power, the legislature has authority to exercise any and all legislative powers not delegated to the federal government nor expressly or by necessary implication prohibited by the national or state constitution.
2. The matter of title to lands and abstracts of title being one of public concern, and there being no constitutional provision which expressly or by necessary implication forbids such legislation, the legislature had power to enact ch. 270, Laws 1878, as amended by ch. 200, Laws 1881, which provided, among other things, that a set of abstract books compiled for and purchased by Outagamie county should be a part of the official records of the office of its register of deeds, that they be open to the public under certain specified restrictions, and that the register should keep up and continue such abstracts and should furnish abstracts on payment of prescribed fees, one half thereof to be retained by him and one half to be paid to the county.
3. Such keeping of abstract books by a county is not a governmental function in the sense that a law authorizing it in a particular county violates the uniformity of the system of town and county government required by sec. 23, art. IV, Const.
4. While by said ch. 270, Laws 1878, as amended, the abstract books are made a part of the official records of the office of register of deeds, they are made so under the limitations provided therein, and hence the restriction upon their use does not conflict with sec. 700, Stats., which requires that the records in the office

of the register of deeds be open to the public without limitation. *Rock Co. v. Weirick*, 143 Wis. 500, distinguished.

5. Said ch. 270, as amended, does not grant "corporate powers" to a county within the meaning of sec. 31, art. IV, Const.—prohibiting the legislature from enacting any special or private laws granting corporate powers except to cities.

6. In view of sec. 4987, Stats.,—providing in effect that no special act relating to a particular county shall be deemed to be repealed by the revised statutes, unless enumerated in the acts thereby repealed,—ch. 270, Laws 1878, as amended, was not repealed by the enactment of the revision of 1898.

7. One who, as register of deeds of Outagamie county, performed the services and received the fees prescribed by said ch. 270, as amended, cannot now allege the unconstitutionality of that statute as a ground for refusing to pay over to the county its proportion of the fees so collected.

8. A public officer takes his office *cum onere* and is entitled to no salary or fees except what the statute provides.

APPEAL from an order of the municipal court of Outagamie county: ALBERT M. SPENCER, Judge. *Affirmed.*

This action was brought against the defendant to recover one half of the money charged and collected by defendant for making abstracts while he was register of deeds between October 1, 1910, and December 31, 1912, under the provisions of ch. 270, Laws 1878, as amended by ch. 200, Laws 1881.

The defendant answered, and among other things set up that ch. 270, Laws 1878, as amended, was unconstitutional and denied plaintiff's right to recover. The plaintiff demurred to the answer for the reason that it did not state facts sufficient to constitute a defense. The court below sustained the plaintiff's demurrer, and from the order sustaining such demurrer this appeal was taken.

For the appellant there was a brief by *Albert H. Krugmeier* and *Fred V. Heinemann,* both of Appleton, and oral argument by *Mr. Krugmeier.*

For the respondent there was a brief by *Morgan & Benton* of Appleton, and oral argument by *John Morgan.*

KERWIN, J. The contention of the appellant is that the law is unconstitutional because (1) it authorizes the county to engage in private business; (2) that, if the business is governmental, the act breaks the unity and uniformity of county government; (3) that the act is a special act, in violation of sec. 31 of art. IV of the constitution.

The answer alleges that the county board of *Outagamie County* procured certain abstracts of title to real estate in said county according to Walton's system of abstracts at an expense of $8,989.26, and that afterwards the legislature of the state of Wisconsin passed ch. 270, Laws 1878, which was later amended by ch. 200, Laws 1881; that ch. 270, Laws 1878, as amended by ch. 200, Laws 1881, made said abstracts of title compiled for and purchased by said *Outagamie County* a part of the official records of the office of the register of deeds of said county, and further provided, among other things, that the register of deeds should have the custody of and safely keep the same, and that the same should be open to the public for reference at all times during business hours, but that no person should be permitted to take any memorandum or abstract therefrom except of the lands and real estate owned by such person, or which he was negotiating to purchase; that the register of deeds was required to keep up and continue said abstract of title affecting real estate in said county and should receive a fee therefor to be paid by those at whose request and for whom the same should be entered; and that the register of deeds should at all times, on demand and upon payment of fees, deliver an abstract of title of any land in said county, one half of the fee to be retained by the register for his own use and the other half paid into the treasury of the county, and that said register shall provide himself with books at the expense of the county for such purposes as provided in the act. The act further provides that the register of deeds shall report the number and character of instruments by him entered and file the

same with the county clerk of said county, which report shall contain such other things as the act requires; that the county board of supervisors of said county may at all times make general regulations as to accounts to be kept by the register of deeds of the fees by him received for transcripts from such abstract.

1. It seems to be conceded by counsel for appellant that there is no specific provision of the constitution of Wisconsin which forbids in terms the legislation in question, but it is said its prohibition is implied, and counsel in support of this contention rely upon *Atkin v. Kansas,* 191 U. S. 207, 24 Sup. Ct. 124; *Rock Co. v. Weirick,* 143 Wis. 500, 128 N. W. 94; *Wis. K. I. Co. v. Milwaukee Co.* 95 Wis. 153, 70 N. W. 68; *Curtis's Adm'r v. Whipple,* 24 Wis. 350; *State ex rel. Garrett v. Froehlich,* 118 Wis. 129, 139, 94 N. W. 50. *Atkin v. Kansas, supra,* turns upon the constitutionality of the eight-hour law as applied to municipalities. *Wis. K. I. Co. v. Milwaukee Co., supra,* is a case where it was sought to support a purely private institution by public taxation, and it was held that the public could not be taxed for a private purpose. To the same effect is *Curtis's Adm'r v. Whipple* and *State ex rel. Garrett v. Froehlich, supra.* In *Rock Co. v. Weirick, supra,* this court merely held that a county could not, without legislative authority, go into the abstract business for profit. The case is therefore no authority in favor of the appellant's position. In the instant case there is no pretense that the public is taxed for a private purpose, hence the contention that a particular county cannot engage in private business at the expense of the public has no application here. The matter of title to lands and abstract of title is matter of public concern and has been so regarded by the legislature. Under the law in question here the abstract is under the supervision of a public officer, register of deeds, and it is made open to the public under certain limitations which the legislature had a right to impose. It is estab-

lished by the decisions of this court that our state constitution is not so much a grant as a limitation of power, therefore the state legislature has authority to exercise any and all legislative powers not delegated to the federal government nor expressly or by necessary implication prohibited by the national or state constitution. *Bittenhaus v. Johnston,* 92 Wis. 588, 595, 66 N. W. 805; *State ex rel. Graef v. Forest Co.* 74 Wis. 610, 43 N. W. 551; *State ex rel. Lamb v. Cunningham,* 83 Wis. 90, 146, 53 N. W. 35. An examination of the law under consideration, ch. 270, Laws 1878, as amended, clearly shows that it violates neither expressly nor by necessary implication any constitutional provision.

2. It is contended by counsel for appellant that the law breaks the unity and uniformity of county government, hence violates sec. 23, art. IV, of the state constitution, which provides that "the legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable." The law in question makes the abstract of title to real estate in *Outagamie County* purchased by the county board of supervisors of said county a part of the official records of the office of the register of deeds of said county, the same to be open to the public for reference under certain restrictions specified in the law. The act in no way interferes with uniformity of the system of town and county government.

There is no doubt under the repeated decisions of this court but that the legislature can confer special powers such as were conferred by the statute under consideration without violating the constitutional provision relating to uniformity of town and county government. *Single v. Marathon Co.* 38 Wis. 363; *Bryant v. Robbins,* 70 Wis. 258, 35 N. W. 545; *Forest Co. v. Langlade Co.* 76 Wis. 605, 45 N. W. 598; *Rock Co. v. Edgerton,* 90 Wis. 288, 63 N. W. 291; *State ex rel. Marinette, T. & W. R. Co. v. Tomahawk Common Council,* 96 Wis. 73, 71 N. W. 86.

It must also be borne in mind that courts will not declare a statute unconstitutional unless it appears clearly to conflict with the constitution. *State ex rel. Hicks v. Stevens,* 112 Wis. 170, 88 N. W. 48; *Peterson v. Widule,* 157 Wis. 641, 147 N. W. 966. It should also be remembered that the constitution only requires that the system of town and county government be as "nearly uniform as practicable." *State ex rel. Busacker v. Groth,* 132 Wis. 283, 112 N. W. 431.

The cases relied upon in this court by appellant do not reach the question here. They relate to matters of local and governmental concern, hence are a part of the system of town and county government, such as *Rooney v. Milwaukee Co.* 40 Wis. 23; *State ex rel. Keenan v. Milwaukee Co.* 25 Wis. 339; *State ex rel. Walsh v. Dousman,* 28 Wis. 541; and *State ex rel. La Valle v. Sauk Co.* 62 Wis. 376, 22 N. W. 572.

The history of legislation in this state on the subject under consideration as well as the decisions of this court show that ch. 270 as amended does not violate the constitutional provision respecting uniformity of town and county government. The legislature passed an act, ch. 352, Laws 1864, authorizing any county in the state on or before the 1st day of December, 1864, to purchase a set of abstract books and make them a part of the official records of the office of the register of deeds. The time was extended by the legislature by ch. 39, Laws 1867, to June 1, 1867. From June 1, 1867, to 1881 there was no general statute authorizing any county to purchase a system of abstract books. By ch. 326, Laws 1909, the legislature authorized counties to create the office of county abstractor. It is clear from decisions of this court and the history of legislation upon the subject that the keeping of abstract books is not a governmental function in the sense that it interferes with the system of town and county government within the meaning of the constitution.

It must be borne in mind in considering ch. 270 as

amended in connection with sec. 700 of the Statutes that they in no manner conflict and that all records in the office of the register of deeds required to be made and kept by sec. 700 are open to the public, and that the restrictions in ch. 270 as amended are confined to the abstract books purchased by *Outagamie County,* and that while the abstract books are made a part of the official records they are made so under the limitations provided for in the act, and in this respect the case under consideration is distinguishable from *Rock Co. v. Weirick,* 143 Wis. 500, 128 N. W. 94. So the restriction in ch. 270 as amended, making the abstract books accessible only to certain persons, in no manner conflicts with sec. 700, Stats. Sec. 700 makes the records therein referred to open to the public without limitation, while ch. 270 as amended, in speaking of the abstract books, provides, "and the same shall be open to the public for reference at all times during business hours, but no person shall be permitted to take any memorandum or abstract therefrom, except only of lands and real estate owned by any such person, or which he is negotiating to purchase." This restriction refers only to the abstract books and has no reference to the general records in the office of the register of deeds.

3. It is further contended that ch. 270 as amended is prohibited by sec. 31, art. IV, of the state constitution. This provision of the constitution prohibits the legislature from enacting any special or private laws granting corporate powers except to cities. Ch. 270, Laws 1878, as amended, does not grant "corporate powers" within the meaning of the constitution. Nothing need be said upon this point except to cite the ruling of this court against the appellant upon the proposition. *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *State ex rel. Att'y Gen. v. Portage City W. Co.* 107 Wis. 441, 83 N. W. 697.

4. It is also argued by appellant that ch. 270 has been re-

pealed. This contention cannot be upheld. Ch. 270 is a special act. Sec. 4987, Stats., provides:

"None of the general provisions of these revised statutes shall be construed so as to affect or repeal the provisions of any special acts relating to particular counties, towns, cities or villages or the officers or offices thereof unless such special acts are enumerated in the acts hereby repealed."

This provision was in force when ch. 270, Laws 1878, was passed and rules the question here, hence there was no repeal.

5. The argument is made by respondent that the appellant is estopped from now contesting the validity of the law under which he acted. It is admitted by the demurrer that the plaintiff paid nearly $9,000 for the abstract of title which has become part of the records of the office of the register of deeds under the provisions of ch. 270, Laws 1878, as amended.

It is alleged in the answer that defendant kept this abstract of title up to date, furnished abstracts to persons requesting the same, kept a record of the abstracts furnished, the number of entries therein, and the amount of fees received therefor, and performed the services and received the fees prescribed by ch. 270, but neglected and refused to pay over to the county its proportion of the fees provided by the law under which he acted. It is clear under the authorities that upon the undisputed facts the defendant cannot act under the law, receive the benefits, and now defend on the ground that he had no authority to collect, and because the law is unconstitutional. *Bullwinkel v. Guttenberg,* 17 Wis. 583; *Cairns v. O'Bleness,* 40 Wis. 469; *La Pointe v. Ashland,* 47 Wis. 251, 2 N. W. 306; *Remington v. Ward,* 78 Wis. 539, 47 N. W. 659.

Some claim is made by counsel for appellant that one half the fees collected was not sufficient compensation and that certain fees were not and could not have been collected by appellant, and that some of the instruments noted upon ab-

stract were taken from other offices. This claim is wholly immaterial. A public officer takes his office *cum onere*. He is entitled to no salary or fees except what the statute provides. *State v. Cleveland,* 161 Wis. 457, 152 N. W. 819, 154 N. W. 980; *Quaw v. Paff,* 98 Wis. 586, 74 N. W. 369; *Burgess v. Dane Co.* 148 Wis. 427, 134 N. W. 841; *Kewaunee Co. v. Knipfer,* 37 Wis. 496; *Security Nat. Bank v. St. Croix P. Co.* 117 Wis. 211, 94 N. W. 74; *Madison v. American S. E. Co.* 118 Wis. 480, 485, 95 N. W. 1097.

We are convinced that the answer states no defense and that the demurrer thereto was properly sustained.

By the Court.—The order appealed from is affirmed.

SIOUX LAND COMPANY, Respondent, vs. EWING and others, Appellants.

December 7, 1916—January 16, 1917.

Depositions to perpetuate testimony: Rules of practice: Statutes: Ability to commence action: "Sufficient cause" for taking deposition: Recording: Competency of witness: Objections, when available: Powers of commissioner: Nonattendance of witness: Fixing another time: Allowance of expense in attending at first hearing.

1. The old rules of practice governing equitable proceedings to perpetuate testimony have been superseded by the rules embodied in the statutes.
2. The facts that there was nothing to interfere with the immediate commencement of an action by the petitioner to quiet title to land, and that the deposition of a witness living without the state might be taken forthwith after the action was begun, did not preclude the granting of a petition for the taking of a deposition to perpetuate the testimony of such witness.
3. Where it appeared that the evidence might be material, that a long delay might be the cause of losing the testimony of the witness, and that there was no want of good faith in the proceeding, it was within the discretion of the court to hold that

the "sufficient cause" required by sec. 4126, Stats., for taking the deposition of such witness had been shown.

4. It being alleged in the petition that plaintiff was the owner and in possession of the land in question, there was no error in refusing to dismiss the proceeding on the ground that defendant's title to the land had been established by a certain judgment quieting such title as against plaintiff's grantors, a determination of that issue not being necessary in this proceeding.

5. Objection to the competency of the witness to testify to transactions with a person since deceased may be made at any time when the deposition taken to perpetuate his testimony is offered in evidence; and where some at least of the testimony therein is manifestly not subject to that objection the recording of the deposition should be permitted.

6. Where the commissioner to take a deposition to perpetuate testimony was expressly authorized to fix the time and place of the taking, such authority was not exhausted by the failure of the witness to appear at the time first fixed, whatever the cause of such failure; and another time might be set.

7. Where in such case defendants made no application to have an allowance made for their expenses incurred in attending at the time and place first fixed, as a condition for the recording of the deposition, the fact that no such allowance was made cannot, on appeal, affect the question of plaintiff's right to have it recorded.

APPEAL from an order of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

The appeal is from an order directing the recording of a deposition taken under proceedings to perpetuate testimony.

The petitioner filed an application with the circuit court for Douglas county in November, 1910, setting forth that it is the owner in fee simple and in actual possession of certain eighty acres of land in Douglas county; that the defendants and appellants are interested, or supposed to be interested, in said land and in the claim and title made by the petitioner thereto; that Louis Freniere and two others residing on the Santee reservation in Knox county, Nebraska, know certain facts concerning the plaintiff's title and claim, which facts petitioner deems material and essential to said title and claim, and that it desires to perpetuate the evidence of said Freniere and others and applies for a commission to take

their testimony; that Louis Freniere is a Sioux Indian and does not understand or converse in the English language, but converses in the Dakota language. Upon this application testimony was taken by the court as to the title to these lands and of the various claims concerning the same, and then an order made fixing a place for the hearing of said application on December 29, 1910, and providing for the giving of notice thereof. Nothing was done on December 29th except to file proof of giving notice of such hearing. On January 12, 1911, *Mary C. Ewing* appeared by counsel and filed written objections to the granting of the application.

Upon hearing had a showing was made on behalf of appellants of a judgment quieting title in them to these lands in an action in the same court in which appellants were plaintiffs and the petitioner's grantors, including said Louis Freniere, were defendants.

On April 21, 1911, the court made an order granting the application, providing for the giving of notice, appointing James Garvie of Niobrara, Knox county, Nebraska, commissioner to examine the witnesses at a time and place to be fixed by him, and provided for notice to be given by the commissioner both by publication and by mail. The order further appointed said Garvie as a competent person to translate the questions and answers. An appeal was taken from such order to this court and such appeal was dismissed. *Sioux L. Co. v. Ewing,* 148 Wis. 600, 135 N. W. 130.

After return to the circuit court of said appeal written interrogatories to be propounded to the witness Freniere were filed. The commissioner fixed November 20, 1912, as the time and his office in Niobrara as the place for the taking of the deposition. On that date counsel for defendants appeared, but the witness did not appear. Thereafter, on suggestion of plaintiff's counsel, the commissioner fixed January 28, 1913, as the time for taking such deposition, but for failure to give proper notice thereof such proposed hearing

was abandoned and renewed proceedings taken fixing March 4, 1913, as the date. At such time no appearance was made by defendants and the witness was examined and his testimony translated and returned to the court.

Objections were interposed to the recording of such deposition, which were overruled, and from the order directing the recording of such deposition this appeal was taken.

For the appellants there was a brief by *Luse, Powell & Luse* of Superior, attorneys, and *S. R. Alden* of Ft. Wayne, Indiana, of counsel, and oral argument by *L. K. Luse* and *C. Z. Luse.*

For the respondent there was a brief by *Grace, Hudnall & Fridley* of Superior, and oral argument by *George B. Hudnall.*

ESCHWEILER, J. Although numerous objections were interposed to the filing of the deposition of Louis Freniere, they are all substantially included in the following:

First, that no sufficient reason is shown for the taking of the deposition; second, that the showing made discloses an entire lack of any interest by plaintiff in the real estate; and third, that the witness was incompetent to testify to transactions between himself and the deceased person through whom appellants claim title.

From the petition it affirmatively appears that the plaintiff claims to be the owner of and is in possession of the premises, and it negatively appears that no action is pending concerning the title to these lands and that there is nothing to interfere with the immediate commencement of such an action. The petition and evidence fail to disclose any immediate need of taking such deposition other than the fact that the witness Freniere is nearly eighty years of age.

Under the situation disclosed the plaintiff was in a situation to commence an action to quiet title, and having commenced such action could forthwith, under the statute and

either before or after issue joined, proceed to take the deposition of the same witness as herein involved, and it is therefore urged by appellants that plaintiff should have been relegated to the relief obtainable in such action rather than be allowed to continue in this special proceeding. It is further argued that while sec. 4126, Stats., governing the taking of depositions without the state, provides that a commission shall issue upon the court being satisfied that there is *sufficient cause* for the taking thereof, there is no such requirement in the statute as to the taking of depositions within the state, and therefore the *sufficient cause* required under that statute must mean substantially that the same reasons must be shown to exist as were required under the old rules of practice in equitable proceedings to perpetuate testimony; the old practice being that no separate proceedings could be had to perpetuate testimony except upon a showing of some actual and substantial impediment to the then prosecution of an action in which such testimony would be material and could be taken.

Evidently, however, the legislature intended its new rules embodied in these statutes to take the place of the old practice, and we can find in the language of the statutes themselves no grounds for holding that it was intended that such a provision of the old rule should survive in the new. Nor can we hold that the statutes governing special proceedings, such as secs. 4117–4134, or those providing for the taking of depositions after an action has been commenced, such as secs. 4102 or 4113, are any of them intended to be exclusive, so that the mere fact that this deposition could have been taken after an action was commenced does not exclude the right to take it before the beginning of an action. We are satisfied, therefore, that the court below was properly within its discretionary powers in holding that when, as here, it appears that the evidence may be material, that a long delay may be the cause of losing the testimony of such witness, and that there is no

want of good faith in the proceeding, then the sufficient cause required by sec. 4126 has been shown.

On the second point involved, it is contended that the judgment quieting title in appellants, shown on the hearing to have been entered as against plaintiff's grantors, including the witness Freniere, is such an effectual quietus to any claim of title by plaintiff that it has no standing to apply for leave to take this deposition in this special proceeding.

As against the claim of ownership and the allegation of possession of the plaintiff, this judgment certainly raised an issue, but one that the court certainly need not, even if it could, dispose of in this special proceeding, and the court below, therefore, did not err in refusing to dismiss the proceedings on that objection.

On the third point it is evident that the objection raised as to the competency of the witness can be effectually raised at any time that the deposition shall be offered in evidence, and much may depend upon the then state of the record and proceedings in such action in determining how far such objection should be sustained. It appears on examination of the deposition herein that some at least of the testimony of the witness would manifestly not be subject to such objection, and the entire deposition cannot be now refused record because some of it may ultimately appear to be inadmissible under proper and timely objections.

Among other objections urged besides those already disposed of, appellants claim that the commissioner had no authority to set another time for the taking of the deposition than that first set by him. But the power and authority was expressly given to such commissioner by the court to fix the time and place of the taking of such deposition and it was not exhausted by the failure of the witness to appear, whatever the cause of such failure.

It is also claimed that the appellants were put to an expense of over $175 in attending at the hearing first noticed,

but it does not appear that any application was made to have any allowance made for such expenses in any way as a condition for the recording of the deposition and it cannot now affect the question of plaintiff's right to have the deposition recorded.

By the Court.—Order affirmed, and the record returned to the circuit court with directions to order the recording of such deposition within thirty days after such return.

CARNEGIE FUEL COMPANY, Respondent, vs. INTERSTATE TRANSFER RAILWAY COMPANY, Appellant.

December 7, 1916—January 16, 1917.

Mechanics' liens: Materials furnished "for or in or about" structure: Coal used in generating power for machinery.

1. Coal furnished to the principal contractor and used in generating steam for engines which operated machinery in making a railroad right of way was not material used "for or in or about" the construction of such right of way, and no lien therefor is given by the statute (secs. 3314, 3315, Stats.).
2. Where material has been consumed in the construction of a building or other structure,—it having had physical contact or immediate connection with the structure itself,—there may be a lien therefor; but if the material be used only to facilitate or make possible the operation of tools or machinery which in their turn act upon the structure, there can be no lien.

APPEAL from an order of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Reversed.*

For the appellant there were briefs by *R. I. Tipton* of Superior and *Fryberger, Fulton & Spear* of Duluth, Minnesota, and oral argument by *H. C. Fulton.*

For the respondent there was a brief by *Luse, Powell & Luse* of Superior, and oral argument by *C. Z. Luse* and *L. K. Luse.*

WINSLOW, C. J. The action is to foreclose a mechanic's lien upon a railroad right of way for the price of coal furnished to the principal contractor to be used and in fact used in engines which operated steam shovels, derricks, and other machinery engaged in the work. This appeal is taken from an order overruling a general demurrer to the complaint, and the question presented is whether our statutes give a lien for such coal. This court has not met this exact question before. In the case of *Barker & S. L. Co. v. Marathon P. M. Co.* 146 Wis. 12, 130 N. W. 866, the question involved was whether lumber and other materials used in constructing a cofferdam for the purpose of holding back water during the construction of a permanent dam and whose life and substance had been practically consumed in the work, were materials furnished "for or in or about" the permanent dam, so as to be lienable under the mechanic's lien law, and it was held that they were.

The whole question was then given the fullest consideration, and it was realized that a line of demarcation must be drawn somewhere or the mechanic's lien law might be carried far beyond the intent of the legislature and property might be subject to liens for materials and labor quite remote from the building itself but still in the direct line of causation and in the absence of which the building could not have been erected. The question was this: If a lien is to be allowed for any material which has not actually entered into the structure, where shall the line be drawn?

It was deemed important that in making the decision which was made in that case the principle upon which it was thought to be logically based should be announced, and it was there held in substance that where material has been consumed in the construction of the building, it having had physical contact or immediate connection with the structure itself, there will be a lien therefor, but that if the material be used only to facilitate or make possible the operation of

tools or machinery which in their turn act upon the structure, there can be no lien. Coal used in portable engines was there mentioned as included in the latter class.

It is certainly true that the question of the lienable character of coal was not then before the court and hence the language is in one sense *obiter,* but it was advisedly used after much thought with the idea that both the legislature and the legal profession were entitled to know where the conclusions reached by the court in that case led.

Authorities supporting the proposition were there cited from Massachusetts, Pennsylvania, and Tennessee. The following authorities might also have been cited: *A. M. Holter H. Co. v. Ontario M. Co.* 24 Mont. 198, 61 Pac. 8; *Houston & T. C. R. Co. v. Anderson,* 44 Tex. Civ. App. 394, 98 S. W. 440; *Central T. Co. v. T. & St. L. R. Co.* 23 Fed. 703; *Cincinnati, R. & M. R. Co. v. Shera,* 36 Ind. App. 315, 73 N. E. 293. Since that decision the following decisions have been made either expressly or by strong implication affirming the same doctrine: *Alpena v. Title G. & S. Co.* 168 Mich. 350, 134 N. W. 23; *Thomas v. Comm.* 215 Mass. 369, 102 N. E. 428; and *Schultz v. C. H. Quereau Co.* 210 N. Y. 257, 104 N. E. 621.

In the case last mentioned the exact question here raised was presented and the lien was denied, the court quoting with approval the language of this court in the *Barker Case.*

It is true that there are some differences in the wording of the various lien statutes in the states covered by these decisions, some giving liens for materials furnished *for* the property, some for materials used *upon,* or *in,* and *for,* or *about* the premises, but they all express substantially the same idea, and no material difference is perceived between them and the Wisconsin statute, which gives a lien for materials furnished "for or in or about" the erection of the structure.

The case of *Johnson v. Starrett,* 127 Minn. 138, 149 N. W. 6, decided in 1914, is directly to the contrary, but is

based upon a different and much broader statute, namely, a statute which gives a lien to one who "contributes to the improvement of real estate by . . . furnishing material . . . for the erection . . . of any building." Much emphasis is placed upon the fact that the coal used "contributed" to the improvement of the defendant's property, and the fact that in the states holding to the other view the statutes are not as broad as the Minnesota statute is given as one of the reasons for not giving the decisions of these states their usual weight.

We are not impressed with the last-named decision, especially in view of the difference in the statute, nor does the case of *City Trust, S. D. & S. Co. v. U. S.* 147 Fed. 155, seem at all persuasive, on account of the difference in the language there construed.

It is significant that there have been several sessions of the legislature since the decision in the *Barker Case* and that the mechanic's lien law has received numerous amendments, but there has been no amendment changing the rule announced in that case. We see no good reason why the court should change it.

By the Court.—Order reversed, and action remanded with directions to sustain the demurrer to the complaint.

CARLOCK, Respondent, vs. JOHNSON, Appellant.

December 7, 1916—January 16, 1917.

Vendor and purchaser of land: Validity of contract: Incomplete agreement: Statute of frauds: Ambiguity: Parol evidence.

1. Where, in a writing stating the terms of a sale of land, the vendor agreed that in conveying title he would stipulate in the mortgage for the release of any given lot or lots "upon payment to me of such a sum as may be hereafter agreed upon by us as being equitable," an agreement as to the amounts to be paid for releases was a condition precedent to the completion of the contract and to its validity under the statute of frauds (sec.

2304, Stats.); and upon a failure of the parties to agree upon that matter the vendee was entitled to recover back the earnest money paid by him.

2. The admission of evidence of the circumstances characterizing the making of such writing and the subsequent treatment of it by the parties was not error; for, if the meaning of the language was not plainly as above stated, such evidence was admissible for the purpose of clearing up the obscurity.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

Action to recover for money had and received.

Plaintiff paid $250 to defendant on a paper which, so far as the same needs to be examined, was as follows:

"Received of *G. R. Carlock,* purchaser, this 6th day of March, A. D. 1915, the sum of two hundred fifty dollars ($250) as earnest money and in part payment for the purchase of the following described real property in the city of Superior, Douglas county, Wisconsin [describing twenty-four city lots], sold to said purchaser . . . for seven thousand nine hundred dollars, . . . payable as follows [specifying five yearly payments commencing April 6, 1915], with interest at the rate of six per cent. per annum."

Then follows an appropriate provision in respect to furnishing abstracts, report on the title, and time for curing discovered defects, the last feature providing for thirty days from written notice of the defects; then a provision to the effect that in case of the title being good, or subject to be made good within such time and the purchaser "does not accept said property and pay for the same as above agreed, earnest money will be forfeited," then this:

"It is further agreed that in conveying title to the purchaser, I will stipulate in the mortgage for the release of any given lot, or lots, upon payment to me of such a sum as may be hereinafter agreed upon by us as being equitable.

"It is also agreed that said sums paid to me as release shall be applied on the next succeeding payment falling due on this payment."

The paper was signed by defendant. Plaintiff claimed, in his complaint, that the agreement was not binding on him because (a) it left open for future negotiation and agreement the amounts which the purchaser would be required to pay for a release of each lot sold from the lien of the mortgage, (b) it did not mention the seller, (c) it did not set the time for giving the deed, and executing the mortgage, and it did not fix the amount of the mortgage. Because of such suggested infirmities, plaintiff claimed the right to recover back the $250. Defendant answered to the effect that, in due course, the title to the land was approved by plaintiff; but thereafter, though the former was at all times ready to carry out the agreement on his part, plaintiff refused to perform.

There was evidence that, preliminary to making the paper, the parties agreed that the amounts to be paid for release of lots should be thereafter agreed upon; that they endeavored to reach such agreement; that defendant submitted a proposition in respect to the matter in writing and offered to have the deed and mortgage prepared in accordance therewith in case of acceptance; that plaintiff declined to accede thereto and suggested that the trade be declared off because of failure to agree in respect to the matter, and that nothing further was done.

A verdict was directed in favor of plaintiff.

For the appellant there was a brief by *Luse, Powell & Luse* of Superior, and oral argument by *L. K. Luse* and *C. Z. Luse.*

For the respondent the cause was submitted on the brief of *Dietrich & Dietrich* of Superior.

Marshall, J. It is conceded that unless the contract was sufficient to satisfy the statute of frauds, it was not binding on respondent and the judgment is right. In that case performance could not have been judicially enforced, nor damages be recovered for a breach.

Counsel for appellant seem to further concede that the clause relating to a future agreement as to the amount to be paid for releases was a material part of the contract, but contend that the agreement contemplated that such clause should be embodied in the mortgage and the amount for releases be agreed upon from time to time as lots were sold and that, in case of inability to then agree, the matter would be a proper subject for judicial interference.

We cannot agree that the parties contemplated leaving the determination to be made for the releases of lots to wait upon sales. We do not see any ambiguity in the language "I will stipulate in the mortgage for the release of any given lot, or lots, upon payment to me of such a sum as may be hereinafter agreed upon by us as being equitable." It is conceded that the word "hereinafter" was inadvertently used for "hereafter." That points quite unmistakably, in view of the context, it is thought, to the interval between the making of the paper and the closing up of the deal. If the idea had been that the agreement should abide the time of sales, the word "then" or some similar word would have been used indicating such idea instead of "hereafter."

That the parties to the paper understood it as indicated is evident from their having endeavored to agree upon the terms of the stipulation before the time for closing up the deal. Had they thought otherwise, there would have been an offer to embody in the mortgage a provision accordingly. Nothing of that kind seems to have occurred. Appellant submitted a proposition in regard to the amount to be paid for leases and offered to have the papers prepared for the conveyance and mortgage, upon respondent notifying him of his consent thereto.

Thus it seems clear that the minds of the parties never met upon the particular matter which was a vital element in the contract. When respondent proposed to call the trade off because of the failure to settle upon the terms of the stipula-

tion, it does not appear that any complaint was made that the time had not arrived requiring such settlement. Appellant, by his conduct, seems to have acquiesced from the first in the view that the agreement as to the amounts to be paid for releases was a condition precedent to a completion of the contract.

Some complaint is made because the court permitted evidence of the circumstances characterizing the making of the contract and the treatment of it thereafter. That evidence was proper. While evidence is inadmissible to contradict or vary the terms of a written contract, in case of ambiguity therein the circumstances of its making and the construction put upon it by the parties by their acts may be shown for the purpose of clearing up the obscurity. There was a dispute here as to the meaning of the language used by the parties. So, at the best the matter can be considered for appellant, there is some obscurity though we are inclined to the view that it is pretty plain. If there be obscurity, the evidence was proper. If there be not, the evidence was not prejudicial. *Klueter v. Joseph Schlitz B. Co.* 143 Wis. 347, 128 N. W. 43.

It does not seem that *Joy v. St. Louis,* 138 U. S. 1, 11 Sup. Ct. 243, applies here. The court there dealt with an agreement that third parties should have certain privileges "upon such terms and for such fair and equitable compensation . . . as may be agreed upon by such companies." A subsequent agreement by such companies, after completion of the contract and as occasion might arise therefor, was plainly contemplated. Not so here. It seems that the case is quite distinguishable from this one.

The result is that a material part of the contract in question was never fully agreed upon. It was a matter which the parties themselves were to settle as a condition precedent to a complete transaction relating to the sale of the land, and, therefore, it was not binding on respondent under the

logic of *Cameron v. Austin,* 65 Wis. 652, 27 N. W. 622; *Harney v. Burhans,* 91 Wis. 348, 64 N. W. 1031; *Buck v. Pond,* 126 Wis. 382, 105 N. W. 909.

By the Court.—The judgment is affirmed.

KOLSBUN, Respondent, vs. AUSEN, Appellant.

December 7, 1916—January 16, 1917.

Real-estate brokers: Agency contract construed: Entire contract: Purchase price over and above mortgage.

An agency contract whereby plaintiff undertook to sell defendant's farm "at and for the price and sum of $3,000, to be paid . . . one half cash, balance on time at six per cent.," and "upon payment of said sum as above provided" defendant agreed to convey title "clear of all incumbrances, except a mortgage of $700 now on said land," was an entire contract for the sale of the whole farm and meant that the sum of $3,000 was to be paid defendant over and above the existing mortgage of $700.

APPEAL from an order of the circuit court for Polk county: E. B. BELDEN, Judge. *Reversed.*

This is an action brought by the plaintiff to recover $500 as damages for the breach of a contract by the defendant.

The defendant is the owner of 120 acres of land which is described in the complaint. Wishing to sell the land, defendant entered into a written agreement with the plaintiff appointing plaintiff his exclusive agent to sell this real estate. The agreement provides that the defendant shall receive

"the price and sum of three thousand ($3,000) dollars, to be paid upon the following terms: one half cash, balance on time at six per cent. interest.

"Upon payment of said sum as above provided, party of the first part agrees to execute and deliver a good and sufficient warranty deed to said land to the purchaser, clear of all incumbrances, except a mortgage of seven hundred dol-

lars now on the said land, and promptly, upon sale being made under this contract by the second party, to furnish a due and proper abstract of title to said land showing title to be clear and marketable.

"It is further agreed by party of the first part that he will pay to party of the second part as and for a commission for the sale of said land five per cent. of the above amount, . . ."

and that the second party should receive as additional commission whatever he may receive over and above the amount the defendant agreed to accept for the sale of the farm.

The plaintiff sold eighty acres of this land to one Sherman and received $200 earnest money from Sherman. Sherman agreed to pay $3,200 for this eighty acres in the following manner: $1,600 in cash, balance on time at six per cent. Plaintiff then requested defendant to close the deal in accordance with their written agreement, to pay him his commission, and to deed him the remaining forty acres of land. The defendant declined to do this by refusing to convey the land to Sherman or the other forty acres to plaintiff.

The defendant demurred to the complaint for failure to state facts sufficient to constitute a cause of action. The trial court entered an order overruling the demurrer. From such order this appeal is taken.

The cause was submitted for the appellant on the brief of *McNally & Doar* of New Richmond, and for the respondent on that of *Kennedy & Yates* of Amery.

SIEBECKER, J. The plaintiff by the contract of agency undertook to sell the defendant's farm "at and for the price and sum of three thousand ($3,000) dollars, to be paid upon the following terms: one half cash, balance on time at six per cent. Upon payment of said sum as above provided," defendant agreed to convey title *"clear of all incumbrances, except a mortgage of seven hundred dollars now on said land,"* and furnish an abstract showing a clear and marketable title.

These provisions of the agreement clearly indicate that it is an entire one for the sale of defendant's whole farm. This the plaintiff has not done. Plaintiff's contract with Sherman is to sell Sherman eighty acres of the 120 acres constituting the farm. Under such sale to Sherman the unpaid balance of $1,600 of the purchase price of the eighty acres could become a claim secured by vendor's lien only subject to the existing $700 mortgage. Obviously, if this mortgage is first enforced against this eighty acres, then the equity in this eighty would be wholly inadequate to secure the payment of the $1,600 unpaid purchase money. Under all the circumstances the inquiry arises whether or not it was agreed that the plaintiff should secure for defendant the sum of $3,000 for the farm over and above the $700 existing mortgage against it. The language of the contract that plaintiff was "to sell" defendant's farm of 120 acres "at and for the price and sum of three thousand ($3,000) dollars, to be paid upon the following terms: one half cash, balance on time at six per cent. interest," carries a strong implication that this amount was to be paid to the defendant regardless of any lien on the land. The clause immediately following the above language, "Upon payment of said sum as above provided," then defendant "agrees to execute and deliver" a deed of the premises to the purchaser "clear of all incumbrances, *except a mortgage of seven hundred dollars now on the said land, . . .*" conveys the idea quite clearly that the sum of $3,000, specified as the sale price in the contract, was to be paid defendant over and above the $700 secured by mortgage on the land. We are convinced that the parties intended and that the agency contract requires of plaintiff to secure the $3,000 for the sale of the farm over and above the existing mortgage of $700. In the light of this condition of the contract the complaint fails to state a cause of action, because the facts alleged do not show that plaintiff has contract with a purchaser for the farm who is ready and willing to

pay the price of $3,000 for the farm and also assume to pay $700 secured by mortgage on the land. The court erred in overruling the demurrer to the complaint.

By the Court.—The order appealed from is reversed, and the cause remanded with direction to enter an order sustaining the demurrer, and for further proceedings according to law.

SMIEGIL, Appellant, vs. GREAT NORTHERN RAILWAY COMPANY, Respondent.

December 7, 1916—January 16, 1917.

Master and servant: Injury to railway employee engaged in interstate commerce: Liability: Federal and state laws: Assumption of risk.

1. The rights of a person injured while repairing cars used solely in interstate commerce are to be determined in accordance with the federal laws, not the laws of the state in which the action is brought or the state in which the accident occurred.

2. Under the federal laws, assumption of risk is still a defense to an action for such injuries; and under the evidence in this case the determination of the trial court that plaintiff assumed the risks incident to the employment is *held* not so clearly wrong as to justify this court in disturbing it.

APPEAL from a judgment of the circuit court for Douglas county: E. B. BELDEN, Judge. *Affirmed.*

Action for personal injuries. The case was tried before the court and a jury. The jury rendered a general verdict in favor of plaintiff. The verdict was set aside by the court and judgment notwithstanding the verdict entered in favor of the defendant dismissing the complaint.

It appears that on the 7th day of May, 1914, at Kelly Lake station in the state of Minnesota, plaintiff with a co-worker was engaged in repairing iron ore cars belonging to defendant and engaged solely in interstate commerce; that while

using a jack for the purpose of forcing and pressing back a steel sheet forming the side and bottom of one of said cars and while pressure was being applied by means of the jack to the sheet in question, the jack sprung out of place, causing the bar which was used to turn the jack to strike plaintiff with great force, resulting in serious injuries in and about his right shoulder. Plaintiff alleged that defendant was negligent in failing to furnish him with a safe place in which to work and in failing to furnish him with safe tools and appliances; that the work attempted to be done should not have been performed at any other place than in regular car shops and could not safely be done in the manner which the defendant required it to be done; and that the method adopted by the defendant in repairing the car was improper, unsafe, and dangerous. From a judgment in favor of the defendant plaintiff appeals.

For the appellant there was a brief by *Hanitch & Hartley* of Superior, and oral argument by *Clarence J. Hartley.*

J. A. Murphy of Superior, for the respondent.

ROSENBERRY, J. Plaintiff being at the time of the accident engaged in the repair of cars employed solely in interstate commerce, his rights must be determined in accordance with the laws of the United States, and not of this state, or of the state of Minnesota in which the accident occurred. Under the laws of the United States assumption of risk is still a defense to an action for personal injuries. Having under consideration the Safety Appliance Act, the supreme court of the United States has held:

"It seems to us that sec. 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking secs. 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk. . . . The as-

sumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part. . . . And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not." *Seaboard A. L. R. Co. v. Horton,* 233 U. S. 492, 503, 504, 34 Sup. Ct. 635.

One of the grounds upon which the trial court granted defendant's motion for judgment notwithstanding the verdict was that in the opinion of the trial court the plaintiff assumed the risk. It must be remembered that the statutes of this state have no application to the case. It is the duty of this court to sustain the judgment of the trial court unless it can be said upon the whole record that the trial court was clearly wrong. Without attempting to state the evidence in detail, we will say that we have carefully examined it, and from that examination we are of the opinion that the trial court was justified in its determination that plaintiff assumed the risks incident to the employment; at least it cannot be said that the trial court was clearly wrong in so finding. The judgment of the trial court was therefore right and should be affirmed.

By the Court.—Judgment affirmed.

SIEBECKER, KERWIN, and ESCHWEILER, JJ., dissent.

KLINGBEIL, Appellant, vs. SAUCERMAN, Executor, Appellant.

December 7, 1916—January 16, 1917.

Limitation of actions: "Injury to person:" Malpractice by physician: Condition precedent to action: Notice of injury, etc.: Form of action immaterial.

1. Service of the notice provided for in sub. (5), sec. 4222, Stats., is a condition precedent to the maintenance of any "action to recover damages for an injury to the person," irrespective of the form of the action.
2. Whether it be in tort or on contract an action against a physician for malpractice whereby bodily injuries were inflicted is an "action to recover damages for an injury to the person" within the meaning of sub. (5), sec. 4222, Stats.

APPEAL from an order of the circuit court for Green county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

Action for malpractice against the executor of the estate of Dr. Loofbourow based upon the breach of an implied contract on the part of the deceased to exercise proper skill and care in treating plaintiff's broken leg. The answer pleaded in bar the failure of plaintiff to give the notice provided for by sub. (5), sec. 4222, Stats. 1913, to which plea the plaintiff demurred. The court overruled the demurrer and the plaintiff appealed.

For the appellant the cause was submitted on a brief signed by *Lehr & Kiefer,* attorneys, and *J. Elmer Lehr,* of counsel, all of Milwaukee.

J. M. Becker and *W. H. McGrath,* both of Monroe, for the respondent.

VINJE, J. This appeal raises the question whether the notice provided for by sub. (5), sec. 4222, Stats. 1913, must be given in order to maintain an action for malpractice based upon a breach of the implied contract on the part

of the physician to exercise proper skill and care in the treatment of plaintiff. In *Frechette v. Ravn,* 145 Wis. 589, 130 N. W. 453, this court held that in such an action based upon tort the notice must be given, but expressly reserved the question here presented. The *Frechette Case* was followed in *Lotten v. O'Brien,* 146 Wis. 258, 131 N. W. 361. The part of the section in question reads as follows:

"No action to recover damages for an injury to the person shall be maintained unless, within two years after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corporation by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made and that satisfaction thereof is claimed of such person or corporation."

It is to be noticed that the clause in question, though in the nature of a statute of limitations, differs therefrom in that it requires a preliminary notice to be served within a specified time instead of fixing the time within which an action shall be begun (*Arp v. Allis-Chalmers Co.* 130 Wis. 454, 110 N. W. 386; *Guile v. La Crosse G. & E. Co.* 145 Wis. 157, 130 N. W. 234); also that the notice must be served in every action for injuries to the person, irrespective of the form of such action. It was stated in *Frechette v. Ravn, supra,* that an action in tort for malpractice was "plainly one to recover damages for injuries to the person." Why? Because defendant's conduct resulted in an injury to the person of plaintiff. If it did so because of the tort, which consisted in a breach of duty created by law, it is difficult to see why it does not do so when the same identical conduct produces the same identical result, though the complaint charges the breach of a duty created by contract between the parties instead of the breach of a duty created by law. Damages may flow from the breach of both duties, and likewise an injury

to the person may result from the breach of a contract as well as from a tort. Where, as in malpractice, there is an option to sue in tort or on contract, each cause of action is grounded upon the same identical acts of the defendant, namely, his failure to exercise the proper skill or care, or both. The very same conduct gives plaintiff his option as to remedies. Hence, if defendant's conduct, when sued in tort, gives rise to an action for injuries to the person, the very same conduct must give rise to the same kind of action when sued on contract. The word "action" as used in the statute has reference to the subject matter or nature thereof, not to its form as a matter of remedial procedure. Whether it be in tort or on contract it is an action to recover damages for injuries to the person and comes alike under the terms of the statute, since the phrase therein, "no action to recover damages for injuries to the person," refers to bodily injuries and not to injuries to feelings. *Wysocki v. Wis. Lakes I. & C. Co.* 125 Wis. 638, 104 N. W. 707.

Cases cited to us from other jurisdictions holding that where statutes prescribe different limitations upon actions sounding in tort and upon those on contract each form of action will be governed by the limitation prescribed for that form, though both might arise from the same transaction and the one be barred and the other not, are clearly not applicable. For in the instant case the service of notice is not made dependent upon the form of action but upon its nature or subject matter. The words "action to recover damages for an injury to the person" mean an action brought on account of or by reason of bodily injuries inflicted upon a human being. Here the complaint charges the infliction of bodily injuries upon plaintiff, and the fact that such infliction is alleged to constitute a breach of contract instead of a breach of legal duty makes it none the less an action for injuries to the person. And if the action is in fact one for injury to the person, then the notice must be served no mat-

ter what form the action takes. As we have already pointed out, it is an action for injury to the person though based upon the breach of a contract, and the demurrer to the answer was properly overruled.

In the following cases the same result has been reached under somewhat similar statutory provisions: *Griffin v. Woodhead,* 30 R. I. 204, 74 Atl. 417; *Basler v. Sacramento E., G. & R. Co.* 166 Cal. 33, 134 Pac. 993; *Webber v. Herkimer & M. St. R. Co.* 109 N. Y. 311, 313, 16 N. E. 358; *Nord v. B. & M. R. Co.* 37 Iowa, 498; *Emmert v. Grill,* 39 Iowa, 690; *Sherman v. Western S. Co.* 22 Iowa, 556; *Blackwell v. Memphis St. R. Co.* 124 Tenn. 516, 137 S. W. 486. The contrary has been held in *Staley v. Jameson,* 46 Ind. 159; *Howard v. Ritchie,* 9 Kan. 102; and *Menefee v. Alexander,* 107 Ky. 279, 53 S. W. 653.

By the Court.—Order affirmed.

ESTATE OF WINZENRIED: WINZENRIED, Appellant, vs. WINZENRIED and others, Respondents.

December 8, 1916—January 16, 1917.

Bills and notes: Validity: Conditional delivery: Gifts: Judgment notwithstanding verdict: Evidence: Sufficiency: Competency: Oral statements contradicting writing.

1. A judgment holding valid a note given by a son to his father, since deceased, is *held* to have been proper, notwithstanding the verdict of a jury to the effect that at the time the note was given the father made a gift to the son of the amount for which it was given—the evidence, so far as it tends to show a gift, being in direct contradiction of the plain terms of the note itself, and the undisputed testimony showing that the delivery of the note was not conditional, but absolute.

2. There having been no attempt by the father to transfer the title to the note, such as by indorsement and conditional delivery, evidence of oral statements by the father subsequent to the making of the note was not competent to contradict its terms.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The estate of Benedict Winzenried was being administered in the county court of Waukesha county. *A. E. Winzenried* was the administrator of the estate and a son of the deceased. As such administrator he inventoried a note for $4,000, dated July 17, 1912, given by himself, but made a notation upon the inventory that he claimed the amount for which the note was given had been given to him by his father. He then moved to strike the note from the inventory as an asset of the estate. The county court of Waukesha county granted the motion, and from the order thereon the objectors appealed to the circuit court. It was stipulated upon the record by all parties in interest, in open court, that the question as to whether or not the alleged note of $4,000, bearing date July 17, 1912, should be included in the inventory as an asset belonging to said estate, or whether during the lifetime of said deceased and at the time said alleged note bears date the principal sum recited therein was a gift from Benedict Winzenried to *A. E. Winzenried,* should be litigated. While the record presents some unusual features, we treat it as involving the validity of the note dated July 17, 1912. If the note is valid, the judgment should be affirmed; if not valid, the judgment should be reversed.

Trial was had before the court and a jury, and the jury found that Benedict Winzenried on July 17, 1912, made a gift to his son *A. E. Winzenried* of the $4,000 which was paid to the Waukesha National Bank in discharge of the note which said Benedict Winzenried had signed with his son *A. E. Winzenried.* After verdict the court granted objectors' motion for judgment notwithstanding the verdict, and by the judgment of the circuit court the order of the county court was reversed and the note in question was made a part of the assets of the estate of Benedict Winzenried. From that judgment *A. E. Winzenried* appeals.

For the appellant there was a brief by *Newbury & Jacobson* of Waukesha, and oral argument by *M. A. Jacobson.*

C. E. Armin of Waukesha, attorney, and *W. L. Gold* of Milwaukee, of counsel, for the respondents.

ROSENBERRY, J. The facts are as follows: *A. E. Winzenried* gave to his father a note of which the following is a copy:

"$4,000. Waukesha, Wis., July 17, 1912.

"One year after date I promise to pay to the order of B. Winzenried four thousand dollars at the Waukesha National Bank of Waukesha, Wis.

"Value received, with interest at five per cent. per annum, payable semi-annually, until paid.

"No. 4461. A. E. WINZENRIED

"Due July 17, 1913."

It appears without dispute that prior to that time Benedict Winzenried had indorsed notes for his son which amounted on the date of the note to $4,000. There were two witnesses to this transaction, the claimant, *A. E. Winzenried,* and Mr. Estberg, an officer of the bank. The claimant testified:

"This note for $4,000 we were speaking about was drawn up at the Waukesha National Bank. At that time my father gave the money to Mr. Estberg for me. *He insisted upon my signing this note before he paid Mr. Estberg.* I found among my father's effects a copy of this note."

Mr. Estberg testified in regard to the transaction as follows:

"There was some money put into our bank to discharge a note made by *A. E. Winzenried* and signed by his father for $4,000. At that time there was a note made running from *A. E. Winzenried* to his father. I have that with me. This is a regular, negotiable, promissory note. This paper or note [set out above] is the note that was given there by *A. E. Winzenried* to his father at the time that he was speak-

ing about. It was left with us after it was executed for collection. He never gave us any instructions at any time to turn this note over to his son *A. E. Winzenried.* It is not indorsed by him."

The note was produced upon the trial by Mr. Estberg.

A. E. Winzenried also testified:

"At that time [time of transaction at the bank] I signed some other paper. I signed a paper saying that I had to pay interest. I do not remember reading that paper. This paper was simply to pay interest and I paid that at the bank."

It was undisputed that the claimant had paid three annual instalments of interest. This is all the direct testimony as to the transaction.

The testimony of Meta Kurtzhals, a daughter of Benedict Winzenried, Emma Winzenried, the wife of the son William Winzenried, Agnes Gowans, the bookkeeper for *A. E. Winzenried,* and that of Daniel Schley and George Schley, was to the effect that some time after the note was given Benedict Winzenried made statements to the effect that he had given *Adolph* (*A. E. Winzenried*) $4,000, on which he was to pay interest until he (Benedict) died, to even him up with the rest of the boys.

The trial court ordered judgment for the objectors notwithstanding the verdict of the jury. The only question presented is, Did the trial court err in so doing?

Appellant claims that judgment should have been rendered on the verdict (1) upon the theory that parol evidence was admissible to prove that the instrument was never actually delivered, but was deposited conditionally and for a special purpose only, under the provisions of sec. 1675—16, Stats.; (2) that the evidence tending to establish a gift of the $4,000 does not contradict or vary the terms of the note.

The trouble with the first proposition is that there is no evidence in the case which establishes or tends to establish the fact that the note was conditionally delivered. The de-

livery, according to the undisputed testimony, was absolute. The note passed from the son to the father, and by the father was left with the bank for collection.

The evidence, so far as it tends to establish the fact that the father intended a gift, is in direct contradiction of the terms of the note, by the plain terms of which the son was to pay the amount thereof to his father.

The cases of *Pirie v. Le Saulnier,* 161 Wis. 503, 154 N. W. 993; *Pritchard v. Pritchard,* 69 Wis. 373, 34 N. W. 506; and *Taylor v. Thieman,* 132 Wis. 38, 111 N. W. 229, are not authority to the proposition that parol evidence may be received to contradict or vary the terms of a written instrument. In the cases cited there was evidence of prior contract. Evidence as to statements made by the deceased was admitted in each case to corroborate and establish the fact that a contract was made, and in those cases there was no instrument in writing which stated and determined the relation of the parties. That evidence of oral statements made by the donor subsequent to the making of the writing in question is not competent to contradict the terms of the writing rests upon elementary principles so familiar that the citation of authority is needless. If there had been any attempt to transfer the title to the note, such as by indorsement and conditional delivery, subsequent statements of the donor might be received for the purpose of corroborating and establishing the fact that such transfer was made. There is no proof of any circumstances of that character in this case. We think the trial court was clearly right in entering judgment for the objectors notwithstanding the verdict.

By the Court.—Judgment affirmed.

ESCHWEILER, J., dissents.

BERGELER, Respondent, vs. WAUKESHA GAS & ELECTRIC COMPANY, Appellant.

December 8, 1916—January 16, 1917.

Electricity: Killing of horse: Source of current: Finding: Evidence: Sufficiency: Burden of proof.

1. In an action against an electric lighting company for the value of a horse killed by electricity with which a pool of surface water on the street had become charged, a finding by the trial court that the electricity had escaped from defendant's distribution system is *held* to be without support in the evidence.
2. The burden was upon the plaintiff in such case to prove that the electricity came, as alleged, from defendant's distribution system, and defendant was not bound to establish that—as there was evidence tending to show might have been the case—the electricity came from another source.

APPEAL from a judgment of the county court of Waukesha county: DAVID W. AGNEW, Judge. *Reversed.*

Action for damages for the value of a horse alleged to have been killed by the escape of electric current from the wires of the defendant company. The case was tried by the court without a jury, and, omitting the merely formal findings, the court found that the defendant company maintained a pole at 517 West Main street in the city of Waukesha upon which were fastened three transformers which received current from the distribution system of the defendant company and reduced the same from a high to a low voltage, from which point it was thereafter distributed; that at the foot of the pole there was a depression in which surface water gathered in a pool; that at the time in question the defendant had allowed electrical current to escape from its distribution system into the pool, so charging it with electricity as to make it dangerous to animal life; that on July 27, 1914, a heavy rain had fallen, causing a pool of water to form in the depression, and that by reason of the failure of the defendant company to properly safeguard its distribution system the street and the pool of water became impregnated with electrical current;

that plaintiff drove his horse into the pool so charged with electrical current, with the result that the horse was electrocuted; and that the horse was of the value of $100. Plaintiff had judgment accordingly and defendant company appeals.

For the appellant there was a brief by *Newbury & Jacobson* of Waukesha, and oral argument by *M. A. Jacobson.*

C. E. Armin of Waukesha, for the respondent.

ROSENBERRY, J. The sole question presented on this appeal is, Does the evidence support the findings? Assuming that the proof establishes the fact that the horse was killed by electrical current communicated to it from the pool of water in question, there is no evidence in the case which proves or tends to prove that the electrical current originated from the distribution system of the defendant. The ground wire provided for the express purpose of preventing the escape of electrical current was admittedly in perfect condition. There is evidence to the effect that the electricity might have been transmitted from the lines of the street railway company some distance away. There is no proof that the horse was in contact with the ground wire or any part of the defendant company's equipment.

The burden was upon the plaintiff to establish the fact that the electrical current which caused the death of the horse escaped from the defendant company's equipment. It is argued that the defendant should have established the fact that the electricity did escape from the wires of the street railway company. This ground is not tenable. Until the fact was established that electrical current had escaped from the equipment of the defendant company to the pool, there was no proof of its liability and no burden upon it to establish the fact that the current of electricity which killed the horse came from some other point.

By the Court.—Judgment reversed, with directions to dismiss plaintiff's complaint.

CLARK, Appellant, vs. WAMBOLD, Respondent.

December 8, 1916—January 16, 1917.

Nuisances: Odors: Pig pens.

If pigs are raised on a farm under conditions as clean and sanitary as can reasonably be attained, considering the characteristics of the animal and the necessity for confinement in close quarters, the fact that odors from those quarters are carried abroad on the summer breeze will not make an actionable nuisance.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This is an action in equity to enjoin the defendant from maintaining a nuisance consisting of pig pens and pig yards immediately adjacent to plaintiff's premises on the east shore of Eagle lake in Waukesha county, Wisconsin. The plaintiff owns two acres of land on the shore of the lake, which he purchased in 1905, part of it being purchased from the defendant, and all of which he uses for summer residence purposes. The defendant owns a farm immediately east of the plaintiff's premises and also operates a feed mill thereon. For years before the commencement of this action he has made a business of raising pigs and selling them when about six weeks old, sometimes having eight or nine brood sows at a time. The yards or inclosures in which the pigs are bred are close to the feed mill and also near the plaintiff's property. The brood sows are fed largely with sweepings from the feed mill. There was much evidence to the effect that the pig pens and inclosures were kept in a filthy condition and that the odors arising therefrom and drifting over the plaintiff's premises were very offensive and continuous during the summer months. There was also considerable testimony to the effect that the pens and yards were kept in as clean and sanitary condition as reasonably possible and better than most farmers are accustomed to keep such places.

The pig pens and inclosures existed and were in use in 1905, when the plaintiff purchased his property along the lake shore, and at that time the plaintiff bought of the defendant two small parcels along the east side of his property, on which pig pens were situated, in order to remove the pens and keep the defendant's hogs further away from his summer house. The defendant raised more pigs during the years beginning with 1911 or 1912 than before. The court found in substance that the pens and yards were kept in as clean and sanitary condition as can be expected; that there were no odors except such as necessarily exist around well kept pens and yards; and that the effect of such odors is not such as to materially interfere with the enjoyment of plaintiff's premises or materially impair their use by people of ordinary sensibilities. Judgment was entered dismissing the complaint without costs except clerk's fees, and the plaintiff appeals.

E. D. Walsh of Waukesha, for the appellant.

For the respondent there was a brief by *Newbury & Jacobson* of Waukesha, and oral argument by *M. A. Jacobson.*

WINSLOW, C. J. The raising of pigs is a perfectly lawful and respectable business. Doubtless it will remain so as long as the human palate craves the thin cut of juicy ham and the crisp slice of breakfast bacon. With all the marvelous advance in the science of animal husbandry which has taken place in recent years we have not yet produced the odorless pig. He may come at some future time in company with the voiceless cat and the flealess dog, but he is not yet in sight. Whenever he comes he will be welcome, but in the meantime pigs will be pigs, and we must put up as best we may with the odorous pig and his still more odorous pen.

Manifestly pigs cannot be raised in the city, hence they must be raised on the farm. If they are raised there under conditions as clean and sanitary as can reasonably be at-

tained considering the characteristics of the animal and the necessity for confinement in close quarters, the fact that odors from those quarters are carried abroad on the summer breeze will not make an actionable nuisance.

It becomes one of those minor discomforts of life which must be borne in deference to the principle that one man's enjoyment of property cannot always be the controlling factor, but must be considered in connection with the reasonable and lawful use of other property by his neighbors.

The trial court in the present case has found upon sufficient evidence that the pens are kept with reasonable cleanliness and we do not find ourselves able to say that the clear preponderance of the evidence is against the finding. It follows that the judgment must be affirmed. Notwithstanding this result, it is not deemed improper to suggest to the respondent that insistence on extreme legal rights is not always good policy, to say nothing of good neighborliness. It is far better to make a friend of one's neighbor by foregoing, at his request, the exercise of some minor right which causes him discomfort, than to make an enemy of him by insisting upon the right simply because the law gives it. It does not appear that it would be difficult, or even inconvenient, to remove the pig yards which are nearest to the plaintiff's property to some other spot upon the farm. Good neighborliness strongly suggests that he ought to do so. A good neighbor is a great treasure. We can generally have such treasures if we are neighborly ourselves. The golden rule is just as good a rule of conduct now as it was nineteen hundred years ago. We are confident that if the defendant acts upon it in the present case he will in the end experience greater satisfaction from that action than he now experiences in the affirmance of this judgment.

By the Court.—Judgment affirmed.

BECKER, Respondent, vs. NOEGEL, Appellant.

December 8, 1916—January 16, 1917.

Bills and notes: Validity: Discharge of prior indebtedness: Married woman: Consideration.

1. A note given on Sunday to take up a note previously given is ineffectual to discharge the indebtedness on such prior note.
2. Where the maker of a note was a widow and had separate estate at the time the note was in fact made, it is immaterial that at the date of the note she was a married woman with no separate property or business.
3. Where the payee in a note made by father and son accepted therefor, after the father's death, a note of the widow (to whom the estate of her husband had come), and thereby waived a claim against said estate and also discharged the indebtedness of the son, either the waiver or the discharge was a sufficient consideration for the widow's note.

APPEAL from a judgment of the circuit court for Washington county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Action on a promissory note.

The making and delivery of the note were admitted; but it was claimed that there was no consideration to support it and that when it was made, defendant was a married woman, having no separate property or business.

The case was decided on these undisputed facts: About May 7, 1910, George Noegel, defendant's son, borrowed $800 from plaintiff, giving his promissory note with his father, Conrad Noegel, as an accommodation maker, due in one year; the transaction on the part of plaintiff being conducted by her husband. May 7, 1911, which was a Sunday, the note was taken up by a new note signed by defendant and her son. There was then real estate in the name of her husband, but none owned by her in her own name. July 1, 1911, he deeded his real estate and conveyed all his personal property to her. July 14th, thereafter, he died. Thereafter she signed the note in suit, and with it took up the one

signed by her and her son. For convenience in computing interest it was dated May 7, 1911, the due date of the first note. When she gave the last note, she said she owned all the property and ought to pay the debt and promised to pay it by signing the note. When the second note was signed, her husband was very sick. She recognized the note by paying interest thereon for two years. The property transferred to her was more than enough, over exemptions, to pay all Mr. Noegel's debts.

Judgment was rendered on such facts for plaintiff and defendant appealed.

For the appellant there were briefs by *John W. Burkhardt* and *Timlin & Dean,* all of Milwaukee, and oral argument by *Mr. Patrick W. Dean* and *Mr. Burkhardt.*

J. C. Russell of Hartford, for the respondent.

MARSHALL, J. A brief treatment of objections made on behalf of appellant to the judgment is all that seems necessary.

The fact that the second note was void because made on Sunday, rendered the transaction ineffectual to discharge the indebtedness on the first note. It existed at the time the note in suit was made and plaintiff had a valid claim therefor against the estate of defendant's husband and against her son.

The fact that appellant was a married woman at the date of the last note is not material, since she was not such when the note was in fact made. She was not then under any disability whatever.

When the last note was given, the indebtedness which was incurred when the first note was given, not only existed against the estate of defendant's husband, but against her son. The void transaction did not discharge such indebtedness as to either. Appellant was vitally interested in protecting the estate of her husband from being called upon to

pay the same. By respondent taking the last note, she waived her claim against the estate and discharged the indebtedness of the son. Either was a sufficient consideration to support the note, as the trial court held, referring to sec. 1675—50, Stats., which embodies a familiar principle of unwritten law. 1 Randolph, Comm. Paper (2d ed.) § 470; 7 Cyc. 701–4; 1 Daniel, Neg. Inst. (4th ed.) § 185.

By the Court.—The judgment is affirmed.

STATE EX REL. BERNHARD STERN & SONS, Respondent, vs. BODDEN, Tax Commissioner, Appellant.

December 8, 1916—January 16, 1917.

Taxation: Constitutional law: Occupation tax on operators of grain elevators: Exemption of grain therein: Statute construed: Classification: Equal protection of the laws.

1. Ch. 209, Laws 1915,—providing (sec. 1057*m*) that "every person . . . or corporation operating a grain elevator or warehouse in this state, except elevators and warehouses on farms for the storage of grain raised by the owner thereof, shall . . . pay an annual occupation tax of a sum equal to one quarter of one mill per bushel upon all wheat and flax and one eighth of one mill per bushel upon all other grain received in or handled by such elevator or warehouse during the preceding year ending April thirtieth; and such grain shall be exempt from all taxation, either state or municipal,"—imposes, not a property tax, but an occupation tax, within the meaning of sec. 1, art. VIII, Const.
2. The provision that "such grain shall be exempt from all taxation" was intended to exempt, in consideration of the payment of the occupation tax, only grain actually in the elevators on May 1st of each year, and not to exempt grain then in the possession of others, although it might at some time during the year be handled in such elevators or warehouses.
3. Under sec. 1, art. VIII, Const., "reasonable exemptions may be provided;" and the grain handled in public elevators and warehouses, being a commodity in transit from place to place in the channels of trade and much of it in such transit from state to state, constitutes a different class of property, for the purposes

of local taxation, from the grain stored in private warehouses by the producer. The exemption of the one and denial of such exemption to the other, as provided in ch. 209, Laws 1915, are based therefore upon legitimate classification, and do not constitute an unjust discrimination or denial of the equal protection of the laws.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

This is a *certiorari* action to review the action of the board of review of the city of Milwaukee in making a personal property assessment against the plaintiff for grain in its elevator on May 1, 1916.

The petitioner operates a grain elevator and warehouse in the city of Milwaukee. On May 1, 1916, petitioner filed with the proper assessor of the city of Milwaukee a statement of all grain received or handled in its elevator and warehouse during the year immediately preceding May 1, 1916. A personal property assessment was made against the petitioner in the sum of $324,300, which included an item of $250,000 as "manufacturer's stock," consisting entirely of grain in the possession of the petitioner on May 1, 1916. Petitioner filed objections against this assessment and appeared before the board of review of the city of Milwaukee and made full disclosure under oath of all personal property belonging to it on May 1, 1916. The board of review thereupon increased the personal property assessment on the grain from $250,000 to $467,060.

The petitioner then brought this *certiorari* proceeding to review the action of the board of review of the city of Milwaukee and have the personal property assessment set aside. The defendant obtained an order to show cause why the writ of *certiorari* should not be superseded and held for naught and the action dismissed upon the ground that the facts stated by the petition are not sufficient to authorize the granting of the relief prayed.

The circuit court entered an order denying defendant's motion to supersede the writ of *certiorari,* and it is from the order denying such motion that this appeal is taken.

For the appellant there was a brief by *Clifton Williams,* city attorney, and *Garfield S. Canright,* assistant city attorney, both of Milwaukee, and oral argument by *Mr. Canright.*

Carl F. Geilfuss of Milwaukee, attorney, and *J. A. Murphy* and *W. R. Foley,* both of Superior, of counsel, for the respondent.

SIEBECKER, J. This action was commenced in the Milwaukee county circuit court by the petitioner praying that a writ of *certiorari* issue to *E. H. Bodden,* as the city tax commissioner, having possession of the records and assessment roll for the 1916 assessment of taxes, to review an alleged erroneous and illegal assessment of the petitioner's personal property, described as "manufacturer's stock" in the tax roll, which it is stated consisted of grain in petitioner's elevator and warehouse on May 1, 1916, located in the city of Milwaukee. The petitioner alleges that such assessment was erroneous and illegal for the reason that such grain was on May 1, 1916, exempt from taxation under the provisions of ch. 209, Laws 1915, creating secs. 1057*m* to 1057*q,* inclusive, Stats. 1915. The appellant claims that these statutes are unconstitutional and void and that this grain was legally taxable and was properly assessed. Ch. 209, Laws 1915, is entitled "An act to create sections . . . of the statutes, providing for the exemption of grain from taxation, providing for the listing of grain in elevators and warehouses, and for an occupational tax on operators of grain elevators and warehouses." Sec. 1057*m* provides:

"Every person, copartnership, association, company or corporation operating a grain elevator or warehouse in this state, except elevators and warehouses on farms for the storage of grain raised by the owner thereof, shall on or before December fifteenth of each year pay an annual occupation

tax of a sum equal to one quarter of one mill per bushel upon all wheat and flax and one eighth of one mill per bushel upon all other grain received in or handled by such elevator or warehouse during the preceding year ending April thirtieth; and such grain shall be exempt from all taxation, either state or municipal."

It is also provided in the act (sec. 1057*o*) that the tax specified in the act "shall be separately assessed to the person . . . chargeable therewith by the assessor and shall be included in the assessment roll annually submitted by such assessor to the town, village or city clerk and shall be entered by said clerk on the tax roll." Other parts of the act deal with the making of returns of amount of business done by operators of such elevators annually, and the payment and collection of such tax, for correction of erroneous return, and assessments for failure of making return by the operators of such elevators and warehouses.

The appellant asserts that the law imposes a property tax within the provisions of sec. 1, art. VIII, of the state constitution. This section provides:

"The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

The last clause of this section was added to the first clause by amendment in 1908. By the amendment the legislature was expressly given the power to impose graduated and progressive taxes on incomes, privileges, and occupations. Privilege and occupation taxes were held to be proper before the adoption of the amendment, and exemption of various kinds had been approved as within legislative discretion when assailed in the courts. It was held in *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627, that taxation by the state under the original constitutional provision, which declares that "the rule of taxation shall be uniform, and taxes

shall be levied upon such property as the legislature shall prescribe," does not limit taxation to an *ad valorem* property tax nor prohibit the levying of excise taxes. In commenting on early decisions of this court on the subject the present chief justice in that case declared:

"So we regard it as settled by the necessary effect of the decisions named that the railroad tax legislation of 1854, and *a fortiori* the railroad license legislation of 1860 and of following years, while imposing a tax in the proper sense, did not impose a tax upon property within the meaning of sec. 1 of art. VIII of the constitution, but was in fact excise taxation upon the privilege of transacting business;" and "It is matter of history that this occupation or privilege tax has been continuously levied by the state unchallenged since the decision of the *Kneeland Case, supra* [*Kneeland v. Milwaukee,* 15 Wis. 454], up to the passage of ch. 315, Laws of 1903, and that a very large part of the revenues of the state have been derived therefrom."

Many other occupation taxes of business are referred to as in force and the properties thereof exempted from taxation, and it was held that this original constitutional provision that "the rule of taxation shall be uniform," so far as applicable to excise taxation, "must necessarily mean taxation which does not discriminate, but which operates alike on all persons similarly situated. In other words, proper classification may be made and a different rate applied to each class." 129 Wis. 221. These principles were also applied in the two railroad tax cases reported in 128 Wis. [*State v. Railway Cos.* 128 Wis. 449, 108 N. W. 594; *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557] and other cases cited therein. These former decisions clearly show that the legislature in dealing with the subject of taxation included in ch. 209, Laws 1915, under the amendment to sec. 1, art. VIII, of the state constitution, was manifestly imposing an occupation tax and was not acting under the first clause of this section, providing for a tax on such property as it might prescribe. A reading of the title of this

chapter clearly indicates what the legislature intended, for it is declared to be: "An act . . . providing for the exemption of grain from taxation, providing for the listing of grain in elevators and warehouses, and for an occupational tax on operators of grain elevators and warehouses." This language manifestly negatives the idea that the tax is a property tax as described by the first clause of this constitutional provision. The provisions of the body of the act declare in the clearest terms that the tax is imposed on the business and that the grain therein specified is to be exempt from taxation. Obviously the tax is an occupational tax and operates equally on all persons within the law.

It is provided in this act that "such grain shall be exempt from all taxation, either state or municipal." The words "such grain" refer back to "wheat and flax" which is "received in or handled by such elevator or warehouse during the preceding year ending April thirtieth." Of this grain only such parts as were actually in the elevators or warehouses on May 1st could be assessed to the operators under the statutes for taxing property. It is a matter of common knowledge that the grain handled in such elevators and warehouses throughout the year which was not therein on May 1st cannot be traced to the possession of others either before or after passing through such elevators or warehouses. It is therefore manifest that the legislature did not intend such grain should be exempt from taxation in the possession of others for the year it was handled in the elevator under the foregoing exemptive clause. It appears that the legislature intended to do the practical and possible thing, namely, to exempt the grain actually in such elevators and warehouses on May 1st of each year. We cannot doubt but that this was the legislative purpose. An exemption of such grain from taxation to the operators of elevators and warehouses seems the natural thing for the legislature to do in consideration of the payment of the occupation tax of the operator. This

tends to accomplish the evident legislative object of securing a more equitable distribution of the tax burdens.

It is strenuously insisted that this interpretation of the act makes it invalid because it exempts grain handled in elevators and warehouses from taxation and makes all grain not so handled taxable. This contention is based on the ground that such exempted grain cannot reasonably be made a class from all other grain for the purposes of taxation and therefore denies to the owner of the nonexempt grain the equal protection of the law. We are cited to *Black v. State,* 113 Wis. 205, 89 N. W. 522, to sustain this claim. It is there said:

"A tax law which makes unjust discrimination,—which taxes one person at one rate, and another one, within the same class and under like circumstances, at another rate, or exempts him altogether,—denies the equal protection of the laws."

This rule is well established, but it is there also stated:

"There may indeed be classification; and if the classification be founded upon real differences, affording rational grounds for a distinction, such classification will not violate the rule of uniformity and equality. So, also, there may be exemption, but the exemption must be reasonable in amount, and founded, also, on rational grounds."

The subject of classifying and exempting property for the purposes of taxation has received repeated consideration in the decisions of this court, as may be seen by examination of the following: *Milwaukee & M. R. Co. v. Waukesha Co.* 9 Wis. 431; *Kneeland v. Milwaukee,* 15 Wis. 454; *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833; *State ex rel. Sanderson v. Mann,* 76 Wis. 469, 45 N. W. 526, 46 N. W. 51; *Kingsley v. Merrill,* 122 Wis. 185, 99 N. W. 1044; *State v. Railway Cos.* 128 Wis. 449, 108 N. W. 594; *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557; *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627; *St. John's*

M. Acad. v. Edwards, 143 Wis. 551, 128 N. W. 113; *Lawrence Univ. v. Outagamie Co.* 150 Wis. 244, 136 N. W. 619. In the *Taylor County Case* the court elaborated at length the grounds upon which the legislature may exempt property under the constitutional provision of sec. 1 of art. VIII before the amendment of 1908. It is there said:

"But the right of the legislature to prescribe what property shall be taxed, includes the right to prescribe what shall not be taxed. The right of choosing some from the multiplicity of kinds, classes, species, use and ownership of property in the state, and the rejection of others, includes the absolute power to discriminate between what shall be chosen and what rejected, except in so far as it may be limited by the requirement of a uniform rule. But what is to be the standard of the rule? The constitution simply defines it as 'the rule of taxation.'" Page 92.

In *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 642, 108 N. W. 557, the court again adverts to the power the legislature may exert regarding exemption:

"Under our constitution, it must be remembered, there is the amplest power on the part of the legislature to exempt an entire class of property from taxation, and to make such class very narrow, even excluding from the benefits accorded to the members thereof those owning property of the same general class, so long as the character of that owned by those of the subclass is so far different from that owned by others, as, within the boundaries of reason at least, to suggest necessity or propriety, having regard to the public good and the constitutional object to be attained, and limitations in respect thereto, of substantially different legislative treatment."

Again on page 655 the court declares:

"The discretion of the legislature in this field is so broad that it is not competent for the court to mark the constitutional limitations of it other than at the farthest one might go without transcending all reason."

The contention is here made that allowance of exemption to elevator and warehouse operators of grains they have on

May 1st in each year, and denial of exemption to others owning grain at such times, is necessarily discriminatory and violates the principle of legitimate classification. It must be borne in mind that the amendment to the constitutional provision authorizing the legislature to impose privilege and occupation taxes also declares that "reasonable exemptions may be provided." The people manifestly intended that the legislature, for the purpose of promoting a more just distribution of the burdens of taxation, should exert this power by the imposition of the specified excise taxes and by allowing liberal exemptions of property from taxation, if the rule of equality is not infringed upon. Commenting on this change in the public policy concerning taxation it was observed in the opinion in the *Income Tax Cases,* 148 Wis. 456, 506, 134 N. W. 673, 135 N. W. 164:

"By this act [Income Tax Law] the legislature has, in substance, declared that the state's system of taxation shall be changed from a system of uniform taxation of property (which so far as personal property is concerned has proven a failure) to a system which shall be a combination of two ideas, namely, taxation of persons progressively, according to ability to pay, and taxation of real property uniformly, according to value."

The legislators had their attention brought, by the state tax commission, to the fact that the system of taxing grain in public elevators and warehouses resulted in evasions and want of equality in taxation, and manifestly endeavored by the present law to provide a more just system of taxation by imposing an occupation tax on operators of grain elevators and warehouses and exempting the grain therein on May 1st from taxation. The grain handled in public elevators and warehouses is a commodity in transit from place to place in the channels of commerce, and much of it is in such transit from state to state. In the light of these conditions, such grain constitutes a wholly different class of property for the pur-

poses of local taxation than does grain stored in private warehouses by the producer, and affords ample distinction between them for classification for the purposes of taxation. Such classification and exemption is in harmony with the constitutional amendment providing for "reasonable exemptions," the previous legislation of the state, and the former decisions of this court on the subject.

We are of the opinion that the trial court properly denied the motion to supersede the writ of *certiorari*, and the order must be affirmed.

By the Court.—It is so ordered.

WIESEDEPPE, Appellant, vs. ZWEIFEL and another, Respondents.

December 8, 1916—January 16, 1917.

Workmen's compensation: When employee becomes subject to act.

Where, by virtue of sub. 2, sec. 2394—5, Stats. (ch. 599, Laws 1913), an employer became subject to the Compensation Act on September 1, 1913, an employee whose contract of hire was made prior to that date did not, under sub. (2), sec. 2394—8, without having given notice of his election, come under the provisions of the act until he had remained in the service of such employer for thirty days after said September 1st.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an appeal from a judgment of the circuit court affirming the order of the *Industrial Commission* dismissing the application of the plaintiff for an award of compensation.

The question to be determined, as stated by the appellant, is whether the amendment to the Compensation Act in 1913 (ch. 599, Laws 1913) brings the plaintiff within the provisions of the Workmen's Compensation Act as it existed on September 26, 1913, the date of the injury complained of.

For some time prior to September 1, 1913, the defendant *Nic Zweifel* employed in carrying on his business seven men, among whom was the appellant. Up to September 1st said employer had not been under the Compensation Act and did not come under it by any positive act of his own, but by force of sub. 2, sec. 2394—5, Stats. 1913, which section provides, in substance, that on September 1, 1913, every employer of four or more employees in a common employment would be deemed to have elected to accept the provisions of the Compensation Act unless he gave notice before that date that he would not come under it. In the instant case the employer never gave such notice.

Plaintiff was employed by defendant a few months prior to September 1, 1913, and so continued until date of the injury. Plaintiff did nothing of a positive nature indicating that he was or was not under the act, but simply continued to work after September 1, 1913. On September 26th, in the course of his employment, he was severely injured.

The *Industrial Commission* and the circuit court held that he was not under the law as amended. Whether he was or not is the only question involved upon this appeal.

The cause was submitted for the appellant on the brief of *Otjen & Otjen* of Milwaukee, and for the respondent *Industrial Commission* on that of the *Attorney General* and *Winfield W. Gilman,* assistant attorney general.

KERWIN, J. The statutes relating to employers and employees under the Workmen's Compensation Act, among other things, provide:

"Section 2394—4. The following shall constitute employers subject to the provisions of sections 2394—3 to 2394—31, inclusive, within the meaning of section 2394—3:

"(1) . . .

"(2) Every person . . . who has any person in service under any contract of hire, . . . and who, at or prior to the

time of the accident to the employee for which compensation . . . may be claimed, shall . . . have elected to become subject to the provisions of sections 2394—3 to 2394—31, inclusive, and who shall not, prior to such accident, have effected a withdrawal of such election, in the manner provided in subsection 1 of section 2394—5.

"Section 2394—5. 1. Such election on the part of the employer shall be made by filing with the industrial commission, a written statement to the effect that he accepts the provisions of sections 2394—3 to 2394—31, inclusive, the filing of which statement shall operate, within the meaning of section 2394—4, to subject such employer to the provisions of sections 2394—3 to 2394—31, inclusive, for the term of one year from the date of filing such statement, and thereafter, without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or any succeeding year, file in the office of said commission a notice in writing to the effect that he desires to withdraw his election to be subject to the provisions of sections 2394—3 to 2394—31, inclusive.

"2. On and after September 1, 1913, every employer of four or more employees in a common employment shall be deemed to have elected to accept the provisions of sections 2394—3 to 2394—31, inclusive, unless prior to that date such employer shall have filed with the industrial commission a notice in writing to the effect that he elects not to accept the provisions hereof. Provided, that any employer commencing business subsequent to September 1, 1913, may make his election not to become subject to sections 2394—3 to 2394—31, inclusive, at any time prior to becoming an employer of four or more employees in a common employment. Such employer may withdraw from the provisions of sections 2394—3 to 2394—31, inclusive, at the expiration of one year or at the expiration of any succeeding year in the manner provided in subsection 1 of section 2394—5."

"Section 2394—7. The term 'employee' as used in sections 2394—1 to 2394—31, inclusive, shall be construed to mean:

"(1) . . .

"(2) Every person in the service of another under any contract of hire, . . . but not including any person whose

employment is but casual or is not in the usual course of the trade, business, profession, or occupation of his employer.

"Section 2394—8. . . . Any employee as defined in subdivision (2) of section 2394—7 shall be deemed to have accepted and shall, within the meaning of section 2394—3, be subject to the provisions of sections 2394—3 to 2394—31, inclusive, if, at the time of the accident upon which liability is claimed:

"(1) The employer charged with such liability is subject to the provisions of sections 2394—3 to 2394—31, inclusive, whether the employee has actual notice thereof or not; and

"(2) Such employee shall not, at the time of entering into his contract of hire, express or implied, with such employer, have given to his employer notice in writing that he elects not to be subject to the provisions of sections 2394—3 to 2394—31, inclusive; or, in the event that such contract of hire was made in advance of such employer becoming subject to the provisions of sections 2394—3 to 2394—31, inclusive, such employee shall have given to his employer notice in writing that he elects to be subject to such provisions, or without giving either of such notices, shall have remained in the service of such employer for thirty days after the employer has filed with said commission an election to be subject to the terms of sections 2394—3 to 2394—31, inclusive, or when such employer has become subject to sections 2394—3 to 2394—31, inclusive, pursuant to subsection 2 of section 2394—5. . . ."

A careful examination of the law convinces us that plaintiff was not at the time of injury under the act. It is plain from the history of legislation on the subject under consideration that the policy of the legislature was not to make the law compulsory on employer or employee. But it is argued by counsel for appellant that the amendment of 1913 makes it clear that the plaintiff was under the act at the time of the injury. This contention is based mainly upon the last part of sub. (2), sec. 2394—8, Stats. 1913, which was added by the 1913 amendment and reads as follows: "or when such employer has become subject to sections 2394—3 to 2394—31, inclusive, pursuant to subsection 2 of section 2394—5."

The argument is that the amendment of 1913 brings the employee under the act regardless of the thirty days' limitation; that immediately upon the employer becoming subject to the act pursuant to sub. 2 of sec. 2394—5, the employee also becomes subject to the act.

We cannot think the legislature intended any such construction as that placed upon the law by counsel for the appellant. On the contrary, we are of opinion that the employee plaintiff was not under the act until the expiration of thirty days after the employer had filed with said commission an election to be subject to the terms of secs. 2394—3 to 2394—31, inclusive, or, in the event that the employer comes under the act pursuant to sub. 2, sec. 2394—5, then within thirty days from the time the employer became subject to the act under said sub. 2, sec. 2394—5.

In other words, we think the true construction of the last part of sub. (2), sec. 2394—8, is that the employee becomes subject to the act when he remains in the service of the employer for thirty days, without giving notice, after the employer has become subject to the provisions of the act either by filing an election to become so subject or pursuant to sub. 2, sec. 2394—5. We are therefore of opinion that the construction placed upon the law by the court below is right.

By the Court.—The judgment is affirmed.

STATE EX REL. OWEN, Attorney General, Respondent, vs. SCHOTTEN, Appellant.

December 8, 1916—January 16, 1917.

Municipal corporations: Village board: Correction of minutes: Intoxicating liquors: Granting licenses: Amending record: Invalidation of license already issued: Number which may be granted.

1. Unless private rights have attached, a village board may order the record of its own proceedings, even after it has once been approved, to be corrected according to the facts; but if third per-

sons have acted in reliance thereon and private rights have accrued thereunder, the record cannot be amended.

2. Where only two liquor licenses could be granted in a village, but the board in form granted three and the minutes showing that they were granted in a certain order were afterwards approved, such minutes, even if incorrect, could not thereafter be amended to show the granting of the licenses in a different order, where the effect of the change would be to render invalid a license already issued to the second licensee named in such minutes and thereby subject him to loss of the fee paid and also to penalties for selling liquor unlawfully.

3. Where, pursuant to a vote of the electors, no licenses are granted in a village for a year or more, rights as to the granting of licenses under the proviso in sec. 1565*d*, Stats., lapse during such no-license period, and thereafter but one license may be granted in that village for each 500 inhabitants or fraction thereof.

APPEAL from a judgment of the circuit court for Monroe county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action to enjoin defendant from maintaining a saloon in the village of Norwalk because no valid license was issued to him. The facts found by the court are these: The village of Norwalk had a population of between 500 and 1,000 on June 19, 1916. In April, 1915, the electors of the village voted "no license" for the license year beginning July 1, 1915, and ending July 1, 1916, so no licenses were issued. In April, 1916, the electors voted in favor of license, and on the 19th day of June the village authorities granted three licenses for the year from July 1, 1916, in the following order: one to John Weibel, one to W. C. White, and one to the defendant herein. The minutes of the meeting showed that the licenses were issued in the order stated, and such minutes were read and approved at the next regular meeting held July 6, 1916; but after this action was begun and on the 3d of August, 1916, three members of the village council, with six out of the seven members present, voted in favor of the following motion, and three did not vote: "that error in the minutes of the regular license meeting be corrected

thus—placing *Louis Schotten* second and W. C. White third." As conclusions of law the court found that the license granted to defendant was void and that he should be enjoined from conducting a saloon in the village of Norwalk. From a judgment entered accordingly he appealed.

For the appellant there was a brief by *Wolfe, Wolfe & Reid* of La Crosse, and oral argument by *A. C. Wolfe.*

For the respondent there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

VINJE, J. The defendant contends that the village council had the power to, and did on August 3d, correct the minutes of the regular meeting of June 19, 1916, to correspond with the fact that defendant was granted the second license. Assuming that the language of the motion is adequate to express the fact that an error was made in the original minutes and that such error was corrected to correspond to the fact, namely, that the second license was granted to the defendant; and assuming further that the motion was carried,—an assumption negatived in *Oconto Co. v. Hall,* 47 Wis. 208, 2 N. W. 291,—we are of the opinion that the council had no power to make such correction because the rights of third parties had intervened and would be prejudicially affected by such correction. The original minutes showed that Mr. White was voted the second license and the evidence shows a license was issued to him. On July 6, 1916, the minutes of the meeting of June 19th were read and approved, and no effort was made to correct them till August 3d, after this action was begun. In the meantime Mr. White, relying upon the fact that the minutes correctly showed that he was granted the second license, paid for it, and presumably has operated under it. Should the minutes be permitted to be corrected as it is claimed they were, he would be subject to the penalties prescribed for run-

ning a saloon without a license, if only two licenses could be legally granted by the village. He would thus not only lose his license fee, but would be subject to severe penalties, not through any fault or neglect on his part, but solely because he was led astray by a record upon which he had a right to rely. Dillon states the rule thus:

"The council, unless private rights have attached, may, doubtless, order the record of its own proceedings, even after it has once been approved, to be corrected according to the facts. But if third parties have acted in reliance upon the record, and private rights have accrued thereunder, the record cannot be amended." 2 Dillon, Mun. Corp. (5th ed.) § 554; *Sawyer v. M. & K. R. Co.* 62 N. H. 135; *California Imp. Co. v. Moran,* 128 Cal. 373, 60 Pac. 969; *New Haven, M. & W. R. Co. v. Chatham,* 42 Conn. 465.

Defendant further contends that under the proviso in sec. 1565*d,* Stats. 1915, three valid licenses could be issued notwithstanding the fact that no licenses were issued for the year ending July 1, 1916, since three valid licenses had been issued by the village before it voted dry in 1915. The claim is that a vote of no license for a year or more and the failure to grant licenses during a no-license period does not constitute a lapse within the meaning of the proviso of sec. 1565*d* so as to bring the number back to that prescribed in the first part of the section, viz. one license for every 500 inhabitants or fraction thereof. The claim is not well founded. As explained in the cases of *State ex rel. Marvin v. Larson,* 153 Wis. 488, 140 N. W. 285; *Zodrow v. State,* 154 Wis. 551, 143 N. W. 693; and *Koch v. State,* 157 Wis. 437, 147 N. W. 366, the purpose of the proviso was to protect existing saloon business in such a way as to create as little hardship thereto as possible and at the same time provide a method for reducing the number of saloons to the ratio prescribed in the first part of the section. A saloon that has been out of business for one year, due to the inability to secure a valid license, is no longer an existing business. It

needs no protection because it has no existence. It was not the object of the statute to foster or create new business beyond the limit of the ratio. On the contrary, it sought to reduce the number down to the ratio limit as speedily as possible without disturbing existing business. A vote of "no license" destroyed all the saloon business for a year. At the end thereof there was no existing business to invoke the aid of the proviso. If a no-license vote of one year did not have this effect, then a no-license vote for ten years or more would not have it. Since the defendant is unable to show an existing business entitled to the protection of the statute, he fails to show that a valid license was issued to him, for confessedly the village could grant but two valid licenses under the ratio limit.

By the Court.—Judgment affirmed.

J. L. OWENS COMPANY, Appellant, vs. WHITCOMB, Respondent.

November 16, 1916—February 13, 1917.

Sales: Acceptance: Retention of machine beyond reasonable time for testing: Findings of fact: Evidence: Sufficiency.

1. One purchasing a machine has a reasonable time and no more in which to test it, and retention after such period is deemed an acceptance sufficient to bind him for the purchase price.
2. In an action for the purchase price of a grain separator which was sold under a contract guaranteeing it to be satisfactory to defendant and was installed and used in his mill while he was in California, a finding of the trial court to the effect that plaintiff agreed that the approval or disapproval of the machine might await the return of the defendant is *held* to be without support in the evidence.
3. The use of such separator from March 20th to May 1st, when it might have been tested in a few hours, constituted an acceptance under the rule above stated and under sec. 1684*t*—48, Stats.
4. A claim by defendant of $15 for services of a millwright in in-

stalling and repairing the separator was improperly allowed by the trial court, it appearing that the millwright's bill included other work, so that there was no satisfactory basis for allowing more than $5 which plaintiff had previously allowed defendant for work done in installing the machine.

APPEAL from a judgment of the circuit court for Pierce county: GEORGE THOMPSON, Circuit Judge. *Reversed.*

The appeal is from a judgment in favor of defendant.

Defendant owns and operates an elevator at River Falls, Wisconsin. The plaintiff manufactures and sells fanning mills, and by correspondence in February, 1915, a contract was made between them for the purchase by defendant of a separator, which, if it did the work specified in the correspondence and was satisfactory to him, was to cost $425. The contract required that the cleaner should do the work at the rate approximately of 200 bushels per hour, and in separating wheat and oats to leave no wheat in the oats and only one half of one per cent. of oats in the wheat cleaned. The machine was to be installed by the plaintiff.

It is conceded that the machine as installed would not separate as cleanly as mentioned in the contract if it was kept up to the speed required to clean the 200 bushels per hour.

The machine arrived at River Falls about March 2d, was set up and run a few days, and then a Mr. Owens, connected with the plaintiff, came on March 20th. The defendant was in California at this time, and one Nebel was in charge of the mill and had authority to deal with the plaintiff with reference to this machine.

At this time Nebel stated that he was not satisfied with the machine, it failing to comply with the guaranty, and that he would not pay for it until he heard from defendant, and that he expected defendant home at the end of April and wished the plaintiff would wait until he came. Owens testified that he would not agree to wait until defendant did return, but would draw a draft upon defendant in such form

that Nebel would have time to write to the defendant about the situation. Nebel did write to defendant, who responded by telegram from California on April 6th, saying: "From your letter cleaner does not perform as agreed. Would not pay but both wire and write Owens I will return April 30th will then take up the matter with them." There is some dispute in the evidence as to whether Nebel communicated this fact to plaintiff by long-distance telephone. It is conceded that he did not write or telegraph after receiving defendant's telegram. March 29th the plaintiff wrote to Nebel, referring to telephone conversation had with defendant and insisting that ample time had elapsed for him to communicate with defendant, and stating that pursuant to the telephone conversation plaintiff would draw a ten-day draft for the amount, deducting $5 claimed by defendant for expense in installing the machine. This draft was not paid and no further attention was paid to this matter by defendant or Nebel. The machine was kept in operation until the return of *Whitcomb,* who then wrote on May 1st to the plaintiff insisting that the machine did not do the work expected, that it must be taken out and the old separator installed according to agreement. The machine was not difficult to install or operate and could be tested in a few hours.

At the close of the testimony each party moved for a directed verdict and the court thereupon made his findings of fact, in which, among others, he found that on the 20th day of March the plaintiff consented and agreed that the approval or disapproval of said cleaner might await the return of the defendant, *Whitcomb,* from California. Upon the findings the court directed judgment dismissing the plaintiff's complaint and giving defendant judgment on his counterclaim in the sum of $15 with costs and disbursements, and from such judgment appeal is taken.

W. G. Haddow of Ellsworth and *Francis B. Hart* of Minneapolis, Minnesota, for the appellant.

For the respondent there was a brief by *White & Skogmo* of River Falls and *E. H. Whitcomb* of Madison, and oral argument by *Mr. Whitcomb* and *Mr. F. M. White.*

The following opinion was filed December 5, 1916:

ESCHWEILER, J. Unless the finding to the effect that at the time the plaintiff's representative was in River Falls on March 20th it was thereupon agreed that the approval or disapproval of the machine might await the return of the defendant from California has support in the evidence, the case must be disposed of under the rule that a person purchasing such a machine has a reasonable time and no more in which to test the same, and retention after such period is deemed an acceptance sufficient to bind the person so retaining it for the purchase price.

An examination of the testimony discloses that such finding must be supported, if supported at all, upon the testimony of one Finn, who was employed from time to time by the defendant about the elevator. He said he overheard a conversation between Nebel and Owens, and that Nebel said that he either would not accept the machine or Mr. Owens must wait until defendant came home, and that Mr. Owens said in reply that he would wait until defendant came. Owens positively denies any such agreement, and Nebel, who was admittedly in charge for the defendant, does not himself so testify, his version of the conversation being that he told Owens that he was not satisfied enough with the machine to pay for it and he would have to wait until he could communicate with defendant, and that Owens agreed to do so, and that Nebel did write to *Whitcomb* and received the telegram given above. The facts and circumstances also clearly indicate that Finn's version of the conversation was a mistake. The fact that Nebel did write to the defendant and the tone of the telegram from defendant indicate very clearly that Nebel and *Whitcomb* did not understand that there was

any definite agreement to wait. We must therefore hold that there is not evidence to support such finding and it must be set aside.

From March 20th on, the machine was used by defendant in its operations in the mill. Such use for that length of time was unnecessary for any reasonable test to be made of the same and must, under the repeated decisions of this court, be considered an acceptance. *Hiltgen v. Biever,* 162 Wis. 315, 156 N. W. 132; *Kelsey v. J. W. Ringrose N. Co.* 152 Wis. 499, 140 N. W. 66; *Fox v. Wilkinson,* 133 Wis. 337, 113 N. W. 669; *Graf v. Laev,* 120 Wis. 177, 97 N. W. 898; *Palmer v. Banfield,* 86 Wis. 441, 56 N. W. 1090; *Cream City G. Co. v. Friedlander,* 84 Wis. 53, 54 N. W. 28; *Boothby v. Scales,* 27 Wis. 626.

The rule of these cases is now embodied in sec. 1684*t*—48, Stats.

The defendant through Nębel claimed an allowance on this machine of $5 for work done in installing the same. This was allowed by the plaintiff. A further claim was made by defendant of $15 for services of a millwright in connection with the installing of the machine or repairing it, but under the testimony it appears that some of the services which the millwright rendered his bill for was for work about the elevator other than in connection with this plant, and there is no satisfactory basis, therefore, for an allowance of anything more than the $5. The judgment should therefore be reversed.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment in favor of plaintiff in the sum of $420 with interest and costs.

A motion for a rehearing was denied, with $25 costs, on February 13, 1917.

MICEK and another, Appellants, vs. WAMKA and husband, Respondents.

January 16—February 13, 1917.

Trial: Amending complaint to conform to proofs: Variance: Nonsuit: Contracts for benefit of third person: Rescission: Exchange of lands: Brokers: Commissions.

1. Under secs. 2830, 2836*b*, Stats., the trial court should permit an amendment of the complaint to conform to the proofs, even though leave to amend is not asked until after the court has announced its decision granting a nonsuit. A variance between the proofs and the allegations of the complaint should be disregarded, and no litigant should be sent out of court where the facts established by the evidence show that he has a just claim.
2. If a person makes a contract with another for the benefit of a third person such third person may enforce it whether or not he has formally assented thereto, and neither one nor both of the immediate parties can rescind the contract or in any way interrupt or prejudice the rights of the third person without his consent, unless the right to do so be reserved in the contract.
3. Thus, where a contract for an exchange of lands provided that each party thereto was to pay as a brokerage fee to certain brokers a specified sum "at the time of the closing of the said exchange," and that all deeds were "to be passed and this negotiation to be closed within fifteen days from the date of this agreement," the parties to such contract could not by rescinding it or refusing to carry it out affect the right of the brokers to receive such fees at the expiration of the fifteen days mentioned.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Reversed.*

Action by real-estate brokers to recover commission. Plaintiffs sued to recover from the defendants the sum of $300, which they claim as a commission for the sale or disposition of defendants' farm. At the close of defendants' testimony the court granted their motion for nonsuit and judgment was rendered and entered dismissing plaintiffs' complaint.

After alleging that plaintiffs were copartners engaged in the real-estate brokerage business the complaint sets forth "that on or about the 15th day of April, A. D. 1913, the above named defendants employed the above named plaintiffs to find them a purchaser or trade for their farm and personal property located in the town of Bellevue, Brown county, Wisconsin, satisfactory to the defendants, and that in the event that the plaintiffs found a purchaser, or were the procuring cause in getting either a trade or sale of the farm and personal property thereon, or instrumental in any way in finding such purchaser, the plaintiffs were to receive as their commission the sum of $300.

"That the above named plaintiffs did actually procure a purchaser who was ready, willing, and able to buy and take said personal property at a price satisfactory to the defendants, and on the 5th day of May, A. D. 1913, a written contract was entered into wherein and whereby the said defendants agreed to convey to one James Wilson the property owned by the defendants, and in consideration thereof the said James Wilson was to convey certain property which he owned in the city of Chicago, and assume the mortgage on the farm owned by the defendants, all of the terms of which contract was reduced to writing and signed by the defendants and the said James Wilson, deeds to be executed within fifteen days from the date of said contract; and it was further agreed in and by said contract so reduced in writing that the defendants were to pay to the plaintiffs the sum of $300 for their commission in closing said deal and in finding a buyer as hereinbefore stated.

"That the plaintiffs have performed all the terms and conditions on their part to be performed under said agreement with the defendants to find them a purchaser and are entitled to the sum of $300 commission, which the defendants now refuse to pay, although often demanded."

Defendants answered admitting that the plaintiffs were copartners, and generally denied the allegations of the complaint excepting as specifically admitted:

"Defendants admit that on May 5th they entered into a certain agreement in writing with one James Wilson for the exchange of certain properties, which properties were described in said written contract, but defendants allege that

in and by the terms of said written contract it was stipulated and agreed that the plaintiffs herein were to receive no commission unless the exchange of properties described in said contract was actually made, and defendants allege the fact to be that the exchange of properties provided for in said written contract was never made and that they are in no manner or in any sum whatsoever indebted to plaintiffs herein."

The case was tried by the court and a jury. Upon the trial plaintiffs offered evidence tending to show that they had been employed by defendants as real-estate brokers; that in pursuance of such employment they procured a purchaser for the farm owned by defendants; that after some negotiations a contract of exchange was entered into between the defendants and the purchaser produced by the plaintiffs, which contract was executed by the defendants and the purchaser and delivered. The contract was a carefully prepared document dated May 5, 1913, described in detail the property which was to be exchanged by the defendants with the purchaser, James Wilson, provided for an exchange of abstracts within ten days from the date of the contract, and that each party should pay his own commission, attorney's fees, and all other costs incident to the negotiations, and contained the following clause in regard to brokerage fees:

"Brokerage fees to be paid as follows, to wit: Party of the first part to pay Micek & Co. three hundred dollars ($300). Party of the second part to pay Micek & Co. two hundred dollars ($200), and to be paid at the time of the closing of the said exchange. This contract to be held in escrow by Micek & Co. for the mutual benefit of the parties hereto.

"All deeds to be passed and this negotiation to be closed within fifteen days from the date of this agreement. Time is hereby declared to be of the essence of this agreement."

From the testimony it appeared that after the contract of exchange had been made a barn situated upon the premises owned by the defendants burned, and for some reason, which does not clearly appear, the defendants refused to carry out their contract with the purchaser, Wilson, it being intimated

that they refused to do so because the plaintiffs would not reduce the amount of commission to be paid them. Plaintiffs then rested and defendants moved for a nonsuit. In fairness to the trial court we reproduce here, in substance, proceedings which then took place as shown by the record:

The court inquired of plaintiffs' counsel if he stood upon the contract of May 5th, and counsel stated that he did not rely upon it at all. The court then inquired of plaintiffs' counsel if he proposed to stand upon a verbal or oral contract prior to the contract of May 5th, and in response counsel stated that he did. There was further colloquy between the court and counsel on both sides, and counsel for plaintiffs then asked leave of the court to introduce further testimony tending to establish the oral contract. To this defendants' counsel objected. Without waiting to have a determination of the matter plaintiffs' counsel then changed his position and stated that he would rely upon the written contract, referring to the contract of May 5th, and that upon that he desired to put in no more testimony. Apparently the court then took a recess until 2 p. m. to consider the matter, and in disposing of it said:

"The record now shows that plaintiff relied upon an oral contract made April 15, 1913, between the parties to this action. He abandoned his complaint and now relies upon a written agreement, and has not attempted to amend his complaint so as to make that written agreement his cause of action, and upon the record of the case and the pleadings as they now stand, and the plaintiff not having asked to amend his complaint to substitute the new cause of action, the motion of the defendants is granted."

Counsel for plaintiffs then asked leave to introduce further testimony to substantiate the cause of action upon the oral agreement and for leave to amend the complaint to comply with the proof, and also asked to be relieved from the statement which he made in open court that he relied entirely upon the written agreement. To this counsel for de-

fendants objected. In passing upon the motion of plaintiffs the court said:

"If plaintiff's motion had been made before the decision had been announced, there is no question but what he would have considered it, but in view of the fact that his decision has been announced in presence of the jury and all jurors serving, and the court feeling that the plaintiff by a nonsuit still has any cause of action he may have preserved to him, his motion at this time will be denied."

Judgment was entered dismissing plaintiffs' complaint, from which judgment plaintiffs appeal.

The cause was submitted for the appellants on the brief of *P. J. Winter* of Shawano, and for the respondents on that of *Martin, Martin & Martin* of Green Bay.

ROSENBERRY, J. Under the former practice the trial court no doubt correctly granted defendants' motion for a nonsuit. Under the provisions of secs. 2830 and 2836*b*, Stats., we think it was clearly the duty of the trial court to have permitted an amendment to the complaint to conform to the proofs and to have disregarded any variance between the proofs and the allegations of the complaint. As was said in *Klaus v. Klaus,* 162 Wis. 549, 156 N. W. 963, "The objection that the evidence and allegations of the complaint are at variance is of no merit."

In justice to the judge who presided, we must say that an examination of the record shows that he is chargeable with no blame in the matter; that plaintiffs were in court without a consistent legal theory, and that plaintiffs' counsel changed his position three times in an apparent effort to have the court try plaintiffs' case. The court's attention was not called to the statute in question and no authorities were cited so far as the record shows. The burden of administering justice cannot be thrown entirely upon trial courts; they have a right to expect and to receive the aid of counsel. Notwithstanding, we think the law is plain and that no liti-

gant should be sent out of court where facts established by the evidence show that he has a just claim.

Inasmuch as the construction of the clause of the contract relating to the payment of brokerage fees has been fully argued and submitted and inasmuch as there must be a new trial of this case, we think it our duty to construe the contract of May 5th. Since *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440, it is the settled law of this state that if a person makes a contract with another for the benefit of a third person the latter may enforce it whether or not he has formally assented thereto, and that, such a contract having been made, neither one nor both of the immediate parties to the transaction can rescind the same or in any way interrupt or prejudice the rights of the third party without his consent, unless the right to do so be reserved in the contract.

The contract of May 5th provides: "The party of the first part to pay Micek & Co. [plaintiffs] three hundred dollars ($300). Party of the second part to pay Micek & Co. two hundred dollars ($200), and to be paid at the time of the closing of the said exchange." It then provided: "All deeds to be passed and this negotiation to be closed within fifteen days from the date of this agreement."

It was beyond the power of the parties to the contract of May 5th to impair or interrupt in any way the rights of the plaintiffs under the provisions of this contract. So far as the plaintiffs are concerned the contract was closed when the fifteen days had expired, and it would have been closed sooner if the exchange had been made sooner. Any attempt by the defendants and the purchaser, Wilson, to rescind the contract, or their refusal to carry it out for any reason whatever, cannot affect the rights of the plaintiffs. The contract specifies that the money shall be paid when the exchange is closed, and specifies the time with exactness for the closing of the exchange.

By the Court.—Judgment reversed, and cause remanded for a new trial.

SEMPIER, Respondent, vs. GOEMANN and another, Appellants.

January 16—February 13, 1917.

Opening default: Discretion: Master and servant: Injury: Independent contractor: Unsafe appliances: Questions for jury: Evidence: Sufficiency: Competency: Principal and agent: Authority to hire servants: Appeal: Harmless errors.

1. An order opening a default and setting aside a verdict is *held* in this case not to have been an abuse of discretion.
2. While engaged with a crew of men in decking or piling logs in Michigan plaintiff was injured by the falling of a log which was prematurely released as it was being hoisted to the pile. One C. was in charge of the work under a contract with defendants pursuant to which he boarded and paid the men and was to be paid a certain sum per thousand; but evidence as to the control exercised by defendants over the piling crew and as to liability insurance procured by defendants covering such crew, together with certain admissions in the original answer, is *held* to sustain a finding by the jury that both plaintiff and C. were servants of the defendants at the time of the injury; and C. was therefore not such an independent contractor that defendants were relieved from liability to plaintiff under the Michigan rule on that subject, which seems to be substantially the same as the rule in this state.
3. The doctrine in Michigan as to the duty of the master with respect to the tools and appliances furnished for the use of his servants seems to be the same as in Wisconsin; and upon the evidence in this case it was a question for the jury whether such duty had been breached by defendants.
4. A finding by the jury that the proximate cause of the injury was negligence of defendants in failing to provide reasonably safe appliances in the so-called pup hooks which were used in raising the logs, is *held* to be sustained by the evidence.
5. A foreman of defendants, who first hired plaintiff and other men, having testified that he was not authorized to hire them for defendants, it was perhaps error to permit plaintiff and another witness to testify that when the foreman employed them he said they were to work for defendants; but in view of the whole situation as shown by the other evidence it is *held* that such error was not material or sufficient to work a reversal.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed.*

The appeal is from a judgment in favor of plaintiff.

The plaintiff was injured while decking or piling logs at Cisco lake, Michigan, in February, 1914. The defendants had a general logging contract to take out and pile these logs. The so-called decking operation was done by the use of a V-shaped frame about twenty feet high resting on another frame, the point of the V upwards, with a pulley at the top and another at the bottom. A rope through these pulleys was attached to the center of a cable a little over sixteen feet long, and on each end of the cable there was a pointed iron hook with a guiding rope. These hooks or "pups," as they are called, would be placed in the ends of the log proposed to be placed on the pile. A team attached to the other end of the rope would pull it through the two pulleys, and the consequent strain on the cable would tighten the hold of the hooks and raise the log to the desired height. The plaintiff as "top" man on the pile would signal the driver of the team when to stop, would see that the log was in proper place on the pile, and then on his signal the men holding the ropes attached to the hooks or pups would pull on them, thereby releasing the log.

At the time in question a log being raised was prematurely released and swung so as to knock plaintiff to the ground and fell on him, causing severe injury.

The summons and complaint were served on defendant *Clark* in April, 1914, and on defendant *Goemann* May 2, 1914. These defendants turned these papers so served over to an agent of the Royal Indemnity Insurance Company and claim to have received and relied upon the assurance of such agent that the insurance company would look after the matter and defend the lawsuit if necessary. Plaintiff's attorney wrote defendant *Goemann* on June 3d calling attention to the service and that the time for answering had expired, but no answer to such letter was received. A personal interview was had between defendant *Goemann* and plaintiff's counsel and the agent of the insurance company on or about July 6th,

at which time the situation was discussed. Nothing further was done until October 16, 1914, when, upon affidavit of default, a verdict upon a hearing then had was returned against the defendants in the circuit court for the sum of $1,950.

The defendants, learning of this verdict through a newspaper account, immediately consulted counsel, and an application was made to the court to have the proceedings opened and they be allowed to defend. On such application the defendant *Goemann* made an affidavit reciting, among other things, that he had fully and fairly stated all the facts and circumstances connected with said injury to his counsel. The verified answer attached to these affidavits contained the following: "Admits that the plaintiff was employed by the defendants; admits that the plaintiff was injured while in the employ of the defendants."

An additional affidavit was made by *Goemann* a few days later in which he stated that since making the answer above referred to he was informed by defendant *Clark* that plaintiff had been discharged by *Clark* a few days before the accident and was then working for one James Cherf, who, it was alleged, was an independent contractor over whom defendants had no control. The amended answer contained neither of the admissions of the original answer quoted above, and alleged that at the time of the injury plaintiff was not in their employment but in that of said James Cherf.

Upon the trial a special verdict was found to the effect that the proximate cause of plaintiff's injury was a want of ordinary care of defendants in failing to provide reasonably safe appliances in the so-called pup hooks. That the co-employees did not fail in ordinary care in attaching the pup hooks to the log that fell. That the plaintiff and said Cherf were each a servant of the defendants at the time of the injury. That $1,800 would compensate plaintiff for his injury. After motion by each party after verdict the court ordered judgment upon the verdict for plaintiff, from which judgment

defendants appealed. The respondent on this appeal gave the notice provided for by sec. 3049*a*, Stats. 1915, and asked to have reviewed the order opening defendants' default and setting aside the verdict found by the first jury.

For the appellants there were briefs by *Kittell & Burke* of Green Bay, and oral argument by *John A. Kittell.*

Lynn D. Jaseph of Green Bay, for the respondent.

ESCHWEILER, J. Upon the respondent's application to review the order of the court below in opening the default, we are satisfied that in so doing the court acted well within the field of judicial discretion and therefore respondent's request must be denied.

On defendants' appeal it is urged in substance that the record established as a matter of law that at the time of the injury plaintiff was employed by an independent contractor, James Cherf; that no actionable negligence was shown or found by the jury; and that the court improperly admitted evidence as to statements made by one Thompson, alleged to be defendants' agent, at the time that the plaintiff was hired.

The plaintiff alleged and proved certain provisions of the workmen's compensation act of Michigan, the state in which the accident occurred, and that defendants had not elected to be and therefore were not subject to its provisions as to compensation. The effect of that act is substantially the same as ours and prevents defendants from relying upon any defense based upon the negligence of the employee himself or of a fellow-employee, or upon the assumption of the risk incident to his employment or from failure of the employer to provide safe premises and suitable appliances. Defendants also offered in evidence certain decisions of the supreme court of Michigan to determine the question of whether or not James Cherf was such an independent contractor as to make him and not defendants liable for the injury to plaintiff. The following cases, viz.: *McClure v. D. S. R. Co.* 146

Mich. 457, 109 N. W. 847; *McBride v. Jerry Madden S. Co.* 173 Mich. 248, 138 N. W. 1077; *Samuelson v. Cleveland I. M. Co.* 49 Mich. 164, 13 N. W. 499, which were so offered by defendants, and also *De Forrest v. Wright,* 2 Mich. 368; *Riedel v. Moran, Fitzsimons Co.* 103 Mich. 262, 61 N. W. 509; *Burns v. Michigan P. Co.* 152 Mich. 613, 116 N. W. 182; *Rogers v. Parker,* 159 Mich. 278, 123 N. W. 1109; *Bacon v. Candler,* 181 Mich. 372, 148 N. W. 194, disclose no substantial difference between the rule in that state and the rule here as to such relationship, as indicated in *Madix v. Hochgreve B. Co.* 154 Wis. 448, 452, 143 N. W. 189.

In the case at bar, while it is true that the uncontradicted evidence shows that there was an oral contract between defendants and Cherf by which he was to have charge of the work of piling the logs, board and pay the men while so doing, and was to be paid at sixty-five cents per thousand, which fact is of considerable weight but not necessarily controlling, yet there was evidence tending to show that defendants did exercise some species of control over the men by shifting at least one of them from the piling crew to work that was admittedly under the personal direction of defendants. The defendants procured liability insurance to cover all the men employed on the entire work, including those working under Cherf, although the proportionate share of such insurance expense appears to have been charged against Cherf by defendants, but after the accident here involved. The admissions in the answer were also proper to be considered in this connection. There were, therefore, facts from which a jury might legitimately draw the inference they did, that Cherf was a servant of defendants under their control at all times and that the arrangement as to compensation was for convenience only, and that therefore he was not such an indipendent contractor as would relieve the defendants from liability under the Michigan authorities or those of this state.

The Michigan court has repeatedly defined the duty of the

master to the employee in regard to tools and appliances. It is said in *Wachsmuth v. Shaw E. C. Co.* 118 Mich. 275, 76 N. W. 497, as follows:

"It is now well settled the master owes to the servant the duty of using ordinary care and diligence in providing for his use sound and safe materials, and such appliances as are reasonably calculated to insure his safety. He is also bound to examine and inspect these things from time to time, and use ordinary care and skill to discover and repair defects in them."

The same doctrine is found in *Morton v. D., B. C. & A. R. Co.* 81 Mich. 423, 46 N. W. 111, and *McDonald v. M. C. R. Co.* 132 Mich. 372, 93 N. W. 1041. We can see no difference between that declaration and the law of this state as shown in *Yazdzewski v. Barker,* 131 Wis. 494, 111 N. W. 689; *Czapinski v. Thomas F. Co.* 158 Wis. 635, 149 N. W. 477, and many other cases; and, tested by the rule common to both states, it was in this case for the jury to determine whether that duty of the master had been breached.

On this question of proximate cause it is urged that there were a number of ways under the testimony by which the log may have become loose and caused the injury and that the jury must necessarily have indulged in mere speculation in making the finding that they did; but it must suffice to say that although the testimony is somewhat indefinite and meager as to what took place at the precise time of the injury, yet there is sufficient in the record to support the finding that it was that precise cause as indicated in the finding, and therefore not some other, that proximately caused the injury, and we cannot now disturb that finding.

One Thompson, a straw boss for defendants, having charge of the skidding operation, hired plaintiff and six other men at De Pere, Wisconsin, to work in the woods. Thompson testifies that he was not employed or authorized by defendants to hire plaintiff or any of these men for them, but that he was asked to do so for one Burdeau, who had a sawing con-

tract under defendants. On his return from De Pere with the seven men the plaintiff and one other were left to work for Cherf, who kept the first camp reached by them. One or more of the others went to work for defendants and several for Burdeau. Subsequently plaintiff did work directly for defendants. There seems also to have been more or less shifting of the men from camp to camp. Under the specific objection that Thompson's authority had not been shown, the court permitted the plaintiff and one other witness to testify that at the time Thompson hired plaintiff and the others at De Pere he told them that they were to work for defendants. The objection was perhaps well taken, but in view of the situation at the close of the trial when the court and jury had for consideration the entire circumstances, the acceptance and retention by defendants of some of the men hired by Thompson, the nature of his employment, the admissions in defendants' answer, their failure to testify to the contrary, and the insuring of all these men by defendants, we cannot say that the error was material or sufficient to reverse.

The other objections to the admission of evidence are not of sufficient importance to require discussion.

By the Court.—The order allowing defendants to defend and the judgment are each affirmed.

BRESADOLA, Administrator, Respondent, vs. GOGEBIC & IRON COUNTIES RAILWAY & LIGHT COMPANY, Appellant.

January 16—February 13, 1917.

Motion to set aside service of summons: Examination of adverse party, when may be taken: "Proceeding."

However formally it may be presented, an application to set aside the service of a summons upon the ground that no jurisdiction over the defendant had in fact been obtained thereby, is a mere motion in the action and is not a "proceeding" in which an examination of the adverse party is authorized by sec. 4096, Stats.

APPEAL from an order of the circuit court for Iron county: G. N. RISJORD, Circuit Judge. *Reversed.*

The appeal is from an order permitting the examination, under sec. 4096, Stats., of officers of defendant.

The cause was submitted for the appellant on the brief of *Sanborn, Lamoreux & Pray* of Ashland and *Charles M. Humphrey* of Ironwood, Michigan, and for the respondent on a brief signed by *Aurelio Bresadola* of Hurley *in pro. per.*, and *LeGendre & Driscoll* and *Herbert M. Norris,* all of Ironwood, Michigan, of counsel.

ESCHWEILER, J. This action is brought to recover damages for the death of Earl Bresadola, who was run over by a street car operated by defendant in Iron county, Wisconsin, and it was claimed that jurisdiction over defendant was obtained on February 27, 1915, by service of the summons in said Iron county on one F. L. Blackhurst, a bookkeeper of defendant. The defendant appeared specially and applied to the court to set aside such service upon the affidavits of said Blackhurst and the secretary of defendant alleging in substance facts tending to show that no jurisdiction in fact had been obtained over the defendant, a Michigan corporation.

Before the hearing of that application the plaintiff served subpœnas upon and gave notice of the proposed examination under sec. 4096, Stats., of said Blackhurst and one Charles Smeeth, who was designated as superintendent of defendant at Ironwood in the state of Michigan, and reciting that such depositions were to be used upon the hearing of the motion for dismissal. The affidavit accompanying such notice recited the nature of plaintiff's cause of action; that discovery was sought of such witnesses as to whether defendant was doing business within the state of Wisconsin on February 27, 1915, and whether said Blackhurst was on that day attending to business of the defendant as one of its officers.

The defendant then moved to set aside such proposed examination, and the court below held that such examination was proper and denied defendant's motion.

It is urged that, with the liberal construction that should be given to this statute, such an application as was made to the court in this case to set aside the service of summons is such a "proceeding" as is covered by the language of the statute providing that depositions may be taken "in any action or proceeding, at any time after the commencement thereof and before judgment."

By statute, sec. 2594, all remedies are divided into "actions" and "special proceedings." It is therefore in these two methods of obtaining relief that such examination may be had at any time after their commencement and before judgment for the purpose of either preparing for pleading or for trial.

In *Ellinger v. Equitable L. A. Soc.* 125 Wis. 643, 104 N. W. 811, it was held that an application under sec. 4183, Stats., for the examination of books and records was a provisional remedy as distinguished from a mere motion or ordinary proceeding in an action, and therefore such an examination under sec. 4096 was held proper; the lower court having denied the right to such an examination under the theory that an application under that sec. 4183 was but a mere motion in the action.

The character of such a proceeding is not changed no matter how formal the method may be by which it is presented. *State v. Wis. Tel. Co.* 134 Wis. 335, 113 N. W. 944.

In the case at bar the application to dismiss the apparent service of the summons was a mere motion in the action and cannot be considered as such a proceeding as is distinguished from and set over against an action in sec. 4096 by the use of those terms "action" and "proceeding." We therefore hold that sec. 4096 does not give sufficient warrant for the holding of such an adverse examination in connection with a motion such as this is here held to be, and that the court below was in error in so holding.

By the Court.—The order of the circuit court is reversed, and the action remanded with directions that the proceedings under sec. 4096, Stats., be quashed.

WASHBURN LAND COMPANY, Appellant, vs. WHITE RIVER LUMBER COMPANY, Respondent.

January 16—February 13, 1917.

Judgment: Equitable relief against: Action to restrain enforcement: Grounds: Mistake and accident: Pleading: Counterclaim: Tax title to land.

1. The abolition of the ancient bill of review in equity did not abrogate any of the remedial rights formerly enforced thereby.
2. When the methods expressly provided in the statutes for obtaining relief against a judgment are not available, equitable relief against an unjust and unconscionable judgment by way of restraining the party who seeks to enforce it may be invoked under the Code procedure in all appropriate cases.
3. The foregoing rule is applicable to judgments in all civil actions whether the rights of the parties determined by such judgments arose at law or in equity.
4. Such equitable relief against an unconscionable judgment may be invoked not only in cases of fraud but also upon the grounds of accident and mistake.
5. Thus, allegations to the effect that a tax upon land was in fact paid in 1888, but by mistake was returned as delinquent and the land sold therefor and a tax deed thereafter wrongfully issued; that the owner of the land at the time said tax was paid and a grantee of such owner continued in possession of the land and paid the taxes thereon without knowledge of any adverse claim until 1912; that upon discovery of the existence of the tax deed an action to quiet title was brought, but, by reason of the mistake of the taxing officers above stated and the accidental loss of the tax receipt by the former owner, without fault or negligence on the part of the plaintiff in that action the facts could not be proved and judgment was consequently entered quieting the title in the tax-title claimant; and that the tax receipt has since been found—state facts upon which equitable relief may be granted against said judgment.
6. Such facts were properly pleadable as a counterclaim, under sec. 2656, Stats., in an action for trespass brought by the tax-title claimant against the plaintiff in the former action.

APPEAL from an order of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

This is an action to recover damages for a trespass which plaintiff alleges the defendant committed upon forty acres of its land by the cutting of timber thereon. The land is described as the southwest quarter of the southwest quarter of section 22, in township 46 north, of range 7 west, in Bayfield county, Wisconsin. The trespass is alleged to have occurred in June, 1912, and at different times thereafter.

The complaint alleges that the plaintiff is the owner of the land in question and that the defendant wrongfully entered such land and without authority cut and removed therefrom a number of pine and other trees of the value of $18,000 and converted such logs into lumber of the value of $45,000. Plaintiff therefore demands judgment for the sum of $45,000.

In the answer of defendant it is alleged that the defendant is the owner of the land in question and that the logs and lumber were only of the value of $15,000. The defendant alleges by way of counterclaim in the action that it is a corporation of this state; that it acquired title to the premises in question by warranty deed on September 4, 1888, executed by John J. Rupp, Moore Kerr, Addison P. Brewer, and Fred B. Brewer, and that such parties had owned the fee title thereof for more than two years prior thereto; that such warranty deed was recorded in the register of deeds' office of Bayfield county on September 28, 1888; that one John W. Humbird owned and controlled the defendant corporation and so continued until June, 1905, when the present owners of the company acquired all the corporate stock, and that the present owners before the last mentioned date had no interest in or connection with said company; that defendant has, since September, 1888, in good faith claimed to own these premises and paid the annual taxes levied thereon up to the year 1913, and cut timber therefrom in 1911 and 1912 in the belief that defendant was the sole owner in fee of the land and without knowledge or information tending to put defendant

upon inquiry as to any claim of title or interest in the premises by any other person until the month of September, 1912, when it discovered that a tax deed dated May 19, 1891, had been issued to A. C. Probert and that such deed had been recorded the same day; that such deed issued on the tax sale of 1888 for the sum of $4.39 delinquent taxes, as reported by the county treasurer. Defendant at this time also learned that a quitclaim deed from A. C. Probert and wife to the plaintiff, dated August 10, 1895, had been executed and recorded; that this was the first knowledge defendant's officers, agents, and servants had of such deeds. The defendant thereupon made a thorough and exhaustive investigation and search for tax receipts showing payment of taxes upon these premises and made inquiry of its grantors respecting the payment of such delinquent tax, who also made a careful and exhaustive search for tax receipts showing payment of such tax, but no receipt including the delinquent tax could be found, although entries were found in the land book of defendant's grantors indicating that this tax had been paid by J. D. Crittenden of Bayfield, Wisconsin. It appears that Crittenden had died many years before. Defendant also alleges that it made an investigation of the records in the office of the county treasurer of Bayfield county, but found no entries tending to show such tax had been paid. On December 31, 1912, the defendant brought an action against this plaintiff to cancel the tax deed and clear the title to the premises, and this plaintiff as defendant in that action claimed title to these premises under the tax deed issued to A. C. Probert. This defendant tendered the prosecution of such action to its grantors of these premises, who again made a search for a tax receipt showing payment of the tax for 1887, but wholly failed to find such receipt. It is alleged that the county treasurer of Bayfield county found a stub indicating payment by defendant's grantors of the tax on the southwest quarter of the southwest quarter of section 20, town 46, but found no such entries in-

cluding the southwest quarter of the southwest quarter of section 22, town 46. The defendant's officers and agents were led to believe by such records that the original tax receipt of defendant's grantors would correspond to such stub referring to such section 20, and therefore concluded and believed that it was unable to make proof of the payment of the alleged delinquent tax for 1887, which it was necessary to do to quiet title in it to these premises, and by reason of the total want of any evidence available to this defendant to show the payment of such alleged delinquent tax for 1887 no evidence was offered in such action upon the question, and judgment was awarded on February 23, 1914, in favor of the *Washburn Land Company,* defendant in that action and plaintiff in this action, quieting title to the land in it. Notice of entry of judgment was served and no appeal was taken from such judgment. The *Washburn Land Company* took no steps to enforce such judgment until February 24, 1915, when it demanded payment from this defendant for the timber cut on these premises in 1912. The counterclaim alleges:

"That thereafter and on or about March 24, 1915, said receipt issued by the town treasurer of the town of Mason to defendant's said grantors for the taxes paid by them on lands in said town for the year 1887, was accidentally discovered among some old papers, supposed to be of no value, belonging to this defendant, which had been removed many years ago from the vault and files of this defendant and placed in an old cupboard in a store room. That said receipt was not found in a place or among any papers with which it could reasonably be expected to be found, but was discovered in an envelope containing old canceled checks and other worthless papers, none of which papers in any wise pertained to any land purchased or transactions of this defendant."

It is alleged that defendant's officers, agents, and servants were ignorant of the existence of this tax receipt, or its contents, or that it in fact had been misplaced, and that the failure to discover it sooner was not due to any neglect, fault, or

lack of diligence on their part; that J. W. Humbird prior to 1905, when the present owner purchased the defendant's stock of him, managed, controlled, and cared for all papers pertaining to titles of land owned by defendant, including tax receipts, and that he died prior to the discovery by defendant of the tax deed in question in 1912; that the tax receipt on its face indicates that the alleged delinquent tax on the southwest quarter of the southwest quarter of section 22, town 46, was paid January 8, 1888, to the town treasurer of the town of Mason by defendant's grantors, and that such tax was in fact so paid by them, and that the tax deed issued for such tax as delinquent, as above stated, was in fact wrongfully issued through the mistake of returning such tax so paid on the land in controversy as delinquent, and that the accidental misplacement of such receipt as above stated rendered it impossible for defendant to make proof thereof in its action to quiet the title to such land in it and resulted in the judgment quieting such title in plaintiff, and, by reason of the mistake in reporting and selling such land for the nonpayment of such tax and the accidental loss of the tax receipt as stated, the judgment obtained by plaintiff in the former action is unjust and inequitable, and its enforcement would be against conscience and justice.

The plaintiff demurred to the counterclaim of the defendant. Such demurrer was overruled by the trial court, and this is an appeal from the order overruling such demurrer.

For the appellant there were briefs by *A. W. MacLeod* of Washburn, attorney, and *Luse, Powell & Luse* of Superior, of counsel, and oral argument by *Mr. L. K. Luse* and *Mr. MacLeod.*

For the respondent there were briefs by *Olin, Butler, Stebbins & Stroud* of Madison, and oral argument by *Byron H. Stebbins.*

SIEBECKER, J. The main controversies on this appeal involve the inquiries: (1) Has the defendant stated a case for

equitable relief against the judgment awarded in plaintiff's favor quieting the title in the lands in question? and (2) If such a case is stated, is it pleadable as a counterclaim in this action?

It is earnestly contended by the plaintiff that upon the facts stated in the answer the defendant is not entitled to equitable relief to restrain the enforcement of the judgment adjudging that the plaintiff is the absolute owner of the premises under the tax deed issued by Bayfield county on May 19, 1891. This contention is made upon the grounds that such equitable relief is not available in this case because under the Code procedure that judgment is in substance and effect a decree in equity and distinguishable from judgments at law. It is claimed that such distinction is preserved under the Code in civil actions in the courts of record in this state; that the remedy by bill of review, which was employed to obtain such equitable relief against the enforcement of such a judgment, having been abolished by the Code, the defendant is precluded from invoking the jurisdiction of equity to obtain such relief, and that it is restricted to the modes of relief provided in the Code for relief from judgments. Much reliance is placed in argument on the principle applied in *Crowns v. Forest L. Co.* 102 Wis. 97, 78 N. W. 433, and other cases holding in effect that the Code of Procedure was intended as a substitute for the old forms of action and modes of procedure and that the former procedure by bill of review for relief from judgments no longer exists. It is contended that under the Code procedure relief from judgments is restricted to the grounds of inadvertence, surprise, mistake, and excusable neglect, and that relief upon these grounds can only be obtained within the limited time and in the manner provided by the Code, except that the enforcement of a judgment may be restrained in a direct proceeding when it is shown that facts have been discovered, after the expiration of such time, which show that a judgment is infected by fraud and its enforcement would be unjust and unconscionable. This contention is based on the

claim that the adjudications of this court establish that judgments in civil actions under the Code are distinguishable and are to be classified as decrees in equity and judgments at law. The *Crowns Case* and other cases do not support this contention. They are in harmony with the express declaration of the Code provisions declaring there is but one form of action: "The distinction between actions at law and suits in equity, *and the forms of all such actions and suits, have been abolished, and there is in this state but one form of action.*" Sec. 2600, Stats. Legal and equitable causes of action are governed by the one system of practice and pleading prescribed in the Code, which is to be employed in all civil actions "for the enforcement or protection of a right, the redress or prevention of a wrong," whether they arise at law or in equity. A court in enforcing rights and redressing wrongs can award but one final judgment in the actions to determine the rights of the parties, whether they arise at law or in equity, or both. True, the Code provides for relief against judgments by the court awarding them and how such relief must be obtained during the term at which they were rendered or within the time limited and in the manner provided by sec. 2832, Stats. But such remedy has not been held to deprive a party of the equitable relief by a direct action to restrain a party from enforcing an unjust and unconscionable judgment, when the statutory remedy is not available. The fact that the Code does not recognize the procedure of the ancient form by bill of review does not in itself bar a party from obtaining the equitable remedy that was enforced by such a bill. Although the Code abolished forms of procedure that had been employed at law and in equity to enforce rights and redress wrongs, the reform did not abolish the recognized and established remedial rights at law and in equity.

"The circuit courts of this state have, under the constitution, succeeded to all the jurisdiction formerly exercised by courts of law and courts of chancery as well; and though old

forms of enforcing judicial remedies have been abolished, that does not mean, necessarily, that the remedies have been abolished. The forms have ceased to exist, but substituted therefor and in place of all we have one form of remedy, denominated a 'civil action.'" *Harrigan v. Gilchrist,* 121 Wis. 127, 231, 99 N. W. 909.

The provisions of the Code do not operate to destroy the jurisdiction in equity to grant relief theretofore recognized for the enforcement of rights and the redress of wrongs. The remedial rights established at law and in equity subsist, but are to be enforced in the manner contemplated by the Code. The abolition of the ancient bill of review in equity, therefore, has not abrogated any of the remedial rights, but they are enforceable by procedural methods in harmony with the Code, which is applicable alike to all civil actions, whether the rights involved are governed by the rules at law or in equity. The power of courts to afford relief pursuant to the Code for the enforcement of rights and the redress of wrongs is well expressed in *Balch v. Beach,* 119 Wis. 77, 86, 95 N. W. 132:

"Above all and over all is the supreme principle to which the vigilant, clean-handed, but wronged party may resort when all legal remedies fail, and even precedents for an equitable remedy also, fitting the situation with exactness as to facts,—that equity suffers no wrong to go without a remedy, the wrong being of sufficient gravity to be appreciated by the conscience of the chancellor, and application being made to its jurisdiction seasonably and with clean hands."

It is considered that the remedial rights of equitable relief against an unjust and unconscionable judgment by way of restraining the party who seeks to enforce it may be invoked under the Code procedure in all appropriate cases against judgments in all civil actions. *Johnson v. Coleman,* 23 Wis. 452; *Orient Ins. Co. v. Sloan,* 70 Wis. 611, 36 N. W. 388; *Laun v. Kipp,* 155 Wis. 347, 145 N. W. 183. The claim that such relief is not available in the instant case because

the judgment determined only equitable rights of the parties cannot be sustained. The adjudications of this court furnish ample authority for the exercise of this equitable jurisdiction in proper cases. This doctrine was clearly announced and applied in the early case of *Stowell v. Eldred,* 26 Wis. 504, as follows:

"The rule seems to be quite well settled, that chancery will relieve against a judgment at law on the ground of its being contrary to equity, when the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defense, or when he was prevented from availing himself of the defense by fraud or accident or the acts of the opposite party unmixed with negligence or fault on his part."

We cannot presume to add anything to the clearness and fulness of this statement of the doctrine or render any aid by attempting to amplify it by discussion. The federal supreme court states it thus in *Marine Ins. Co. v. Hodgson,* 7 Cranch (11 U. S.) 332:

"Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

The following cases in this court deal with this form of relief: *Johnson v. Huber,* 106 Wis. 282, 82 N. W. 137; *Balch v. Beach,* 119 Wis. 77, 95 N. W. 132; *Boring v. Ott,* 138 Wis. 260, 119 N. W. 865; *Laun v. Kipp,* 155 Wis. 347, 145 N. W. 183; *Zohrlaut v. Mengelberg,* 158 Wis. 392, 148 N. W. 314, 149 N. W. 280. See, also, *Oro Fino & Morning Star M. Co. v. Cullen,* 1 Idaho, 113. These cases all hold in effect that the former judgment is not disturbed and that

no retrial of any issues litigated in the action and determined in the judgment is permitted. The courts act upon the party by forbidding him to enforce the judgment and thus prevent him from reaping the fruits of an unjust and unconscionable judgment. *Crowns Case, supra; Balch Case, supra; Zohrlaut Case, supra.* It is asserted that this equitable relief can be invoked only in cases of fraud and that the defendant here has no such cause of action and hence no standing in court. The judicial statements on the subject quite explicitly declare that this equitable jurisdiction can be invoked upon the grounds of accident and mistake. A study of the adjudications beginning with the *Stowell Case* [*Stowell v. Eldred,* 26 Wis. 504] discloses this result. The rule is stated thus in Freeman on Judgments, sec. 486:

"While the courts of equity in England and in the several states of this Union have uniformly refused their aid in all cases where their action would involve either the usurpation of appellate jurisdiction or the granting of a second opportunity of presenting a cause upon its merits, they have, on the other hand, uniformly extended their beneficent principles and their varied and efficient means of relief over a large and well-defined class of cases, to the end that no man should retain an unconscientious advantage procured by him in a court of law or of equity through his own fraud or through some excusable mistake or unavoidable accident on the part of his adversary. . . . To entitle a party to relief from a judgment or decree, it must be made evident that he had a defense upon the merits, and that such defense has been lost to him, without such loss being 'attributable to his own *omission, neglect,* or *default.*'" *Davis v. Tileston,* 6 How. (47 U. S.) 114, 119; *Wingate v. Haywood,* 40 N. H. 437; *Nat. S. Co. v. State Bank,* 120 Fed. 593.

It is urged that the facts stated in the counterclaim do not constitute a cause of action for equitable relief upon the grounds of a mistake or unavoidable accident. We must give the allegations a liberal interpretation. It appears from the facts alleged that the officers, agents, and servants

of the defendant used due diligence to find the tax receipt in question at the time the former action to quiet title to this land was pending for trial, and that they made repeated efforts by exhaustive search to ascertain its existence for the purpose of offering it as evidence on the trial, but utterly failed to find it, and that it was accidentally discovered in March, 1915, among papers that had been discarded as useless and which were of a nature wholly different from this tax receipt. It also appears that this receipt was so misplaced while the former owner of the defendant company, who is now deceased, had control thereof, and that the present owners of the defendant and their officers, agents, and servants had no part in or knowledge or suggestion of such misplacement of the paper. These facts and circumstances present a case of accidental loss of this receipt. The facts show that defendant was in all probability defeated in the action to quiet title because it had not discovered the receipt in season to present it as evidence in that case. Under this state of facts it is apparent that the defendant undesignedly sustained a legal loss, unmixed with any negligence or fault on its part, and is entitled to the equitable relief prayed for, if the allegations of the counterclaim are sustained by evidence.

Is the defendant's cause of action pleadable as a counterclaim? Sec. 2656, Stats., provides that a counterclaim must be "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the subject of the action." It is manifest that the alleged counterclaim is connected with the plaintiff's rights established by the judgment in the former action, and if maintained will defeat the plaintiff's right to a recovery upon its cause of action founded on the rights determined in such judgment. It is difficult to perceive of a case wherein the cause of action of defendant's counterclaim can be more directly connected with the subject of the plaint-

iff's cause of action than the one presented here. The defendant's cause of action goes to defeat the very judgment on which plaintiff bases its rights to a recovery and constitutes the basis for affirmative relief to defeat the relief plaintiff demands. *Stowell v. Eldred,* 39 Wis. 614; *Chicago & N. W. R. Co. v. McKeigue,* 126 Wis. 574, 105 N. W. 1030; *Emerson v. Nash,* 124 Wis. 369, 102 N. W. 921; *McArthur v. Moffet,* 143 Wis. 564, 128 N. W. 445.

The counterclaim states facts sufficient to constitute a cause of action and is properly pleaded as a counterclaim.

By the Court.—The order appealed from is affirmed.

GUILD, Respondent, vs. DENISTON, Appellant.

January 16—February 13, 1917.

Pleading: Counterclaim: Filing reply at trial: Vendor and purchaser: Contract construed: Rescission: Time for giving notice.

1. The filing of a reply to a counterclaim was properly permitted at the trial in this case.
2. Under a land contract providing that the vendor would "any time before January 1, 1914, at the express option of the [vendee] and within thirty days of written notification by him," refund to said vendee the money paid by him and cancel the contract, the vendee did not need to give the notice of rescission thirty days before January 1, 1914, but might do so at any time before that date.

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

This is an action to recover $300, with interest, which had been paid upon a land contract. Plaintiff claims to have rescinded the land contract.

On February 7, 1913, plaintiff and defendant entered into a written agreement whereby defendant agreed to sell to the plaintiff certain lands for $1,600. Of this sum $300

was paid at the time of the delivery of the contract and the balance was to be paid as specified in the contract with interest at six per cent. per annum. The agreement contained the following provision:

"It is mutually agreed by and between the parties hereto that the said party of the first part will, any time before January 1, 1914, at the express option of the said party of the second part and within thirty days of written notification by him, refund to the said second party the sum of money by him paid according to the foregoing agreement, together with six per cent. interest upon the same from the date hereof, and surrender and cancel this contract."

It appears without dispute that plaintiff wrote defendant in December, 1913, exercising the option for the return of the money he paid and for the cancellation of the contract.

At the close of the trial plaintiff moved for a directed verdict in his favor, which motion was granted. Judgment was entered in favor of the plaintiff in the sum of $371.80. From such judgment this appeal is taken.

The cause was submitted for the appellant on the brief of *John J. Fisher* of Bayfield, and for the respondent on that of *A. W. MacLeod* of Washburn.

SIEBECKER, J. It is held in this case:

(1) That the court properly permitted the plaintiff to file a reply to defendant's counterclaim at the time the action was on trial. This action of the court was clearly within its power to disregard any defect in the proceeding which does not affect any substantial right of the adverse party.

(2) That the trial court properly interpreted the provision of the contract giving the plaintiff the option to cancel the contract of the parties and compel the defendant to refund the money he had received on the contract with interest. While the terms of this provision are not as clearly expressed as language might make them, yet they naturally convey the meaning that any time before January 1, 1914,

at the plaintiff's option and within thirty days of written notification by plaintiff, defendant will refund the amount plaintiff had paid on the contract with six per cent. interest and surrender and cancel the contract. The evidence shows that plaintiff did give defendant written notification that he exercised his option to cancel the contract and demanded repayment of the moneys paid thereon with interest. We consider that this was in compliance with the terms of the contract. The acts of the parties harmonize with this idea. Under these facts and circumstances the defendant was liable for the $300 he had received on the contract, and the court properly awarded judgment for the recovery thereof with interest.

By the Court.—The judgment appealed from is affirmed.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant, vs. BYSTROM, imp., Respondent.

SAME, Respondent, vs. WASHBURN LAND COMPANY, imp., Appellant.

January 16—February 13, 1917.

Deeds: Quitclaim: Cancellation: Rescission: Mistake of grantor as to title: Negligence: Tax titles: When tax deed void: Possession by original owner: Equity: Costs: Discretion: Innocent purchaser of land: Railroads: Right of way, when does not pass by deed.

1. In an action against a railway company to quiet title based upon a tax sale and deed of certain lands over which the defendant's railroad ran and which was otherwise occupied for railroad purposes outside of the right of way, the complaint alleged that the land was vacant and unoccupied and made no reference to the railroad. The defendant railway company owned a very large amount of land in the state, in general charge of its land commissioner, and the matter was referred to him by the legal department of the company. He reported that the company had

no interest in the lands, and relying upon such report, and not knowing that the railroad ran over the lands and that they were in the charge of its right-of-way commissioner, the company, through its legal department, disclaimed any interest in the lands and gave a quitclaim deed to the tax-title claimant. The lands remained in the possession of the railway company and it paid the taxes thereon for more than three years after the recording of the tax deed. In a subsequent action by the railway company to set aside on the ground of mistake said quitclaim deed and a subsequent deed given by the grantee therein, upon evidence of the above and other facts it is *held* that the officers of the company were not inexcusably negligent in giving the quitclaim deed, and that because of their mistake such deed is void as against the grantee therein.

2. Equity will grant relief by way of rescission in a proper case for the mistake of one party as readily as for a mutual mistake, where it would be contrary to equity and against conscience to allow the enforcement of the contract.
3. Under secs. 1187, 1188, Stats., where the original owner of land sold for taxes continues in the occupancy and possession thereof for three years after the recording of the tax deed, such deed is void; and the possession of a part of the premises is possession of the whole.
4. In an equitable action where important issues are contested by the defendant the costs are in the discretion of the court; and in this case a judgment for costs against the defendant is *held* not an abuse of discretion.
5. One who purchased a part of the lands in suit from the grantee in the quitclaim deed above mentioned while the record title was in such grantee, and who, before purchasing, had examined such title and had also made inquiry of the railway company's land commissioner as to what that company's rights were and had been informed that it did not own the land, was properly held an innocent purchaser and his title confirmed.
6. Upon the facts above stated the railroad right of way over the lands in suit did not pass to the grantee in the quitclaim deed or to the purchaser from such grantee.

APPEALS from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

This action was brought to cancel and set aside a quitclaim deed of the northeast quarter of the southwest quarter and the south half of the northwest quarter of the southwest quarter of section 9, town 47 north, of range 5 west, in Bayfield

county, Wisconsin, executed by the plaintiff to the defendant *Washburn Land Company,* and the record thereof, and also to cancel a warranty deed of the northeast quarter of the southwest quarter to the defendant *Jonas Bystrom* and the record thereof, on the ground that the quitclaim deed from plaintiff to the *Washburn Land Company* was made by mistake, and that the conveyance by the *Washburn Land Company* to *Bystrom* was made under such circumstances that *Bystrom* was chargeable with notice of plaintiff's claim to the land and was not an innocent purchaser for value.

The answer of defendant *Washburn Land Company* put in issue the allegations as to the mistake in the execution of the deed to it, and also set forth the conveyance to defendant *Bystrom,* but set up no counterclaim for the purpose of quieting its title to the land. The defendant *Bystrom* set up a tax title in one D. M. Maxcy, conveyance of the land by him to the defendant *Washburn Land Company,* and purchase by defendant *Bystrom* and conveyance to him by the *Washburn Land Company* of the forty acres claimed to be owned by defendant *Bystrom.*

The plaintiff replied alleging that the tax deed was void for several reasons. It was stipulated at the close of the trial that the court should determine, subject to the right of appeal, the title to the twenty acres held by the *Washburn Land Company* as well as the forty-acre tract held by defendant *Bystrom.*

The court below made findings of fact and conclusions of law and ordered judgment thereon that the defendant *Bystrom* was an innocent purchaser of the forty acres and quieted title to the same in him, but set aside the title to the south half of the northwest quarter of the southwest quarter of section 9, claimed by the defendant *Washburn Land Company.* Judgment was entered accordingly, from which both parties appealed.

For the plaintiff there was a brief by *Luse, Powell & Luse*

of Superior, attorneys, and *J. B. Sheean* of St. Paul, Minnesota, of counsel, and oral argument by *L. K. Luse.*

A. W. MacLeod of Washburn, for the defendant *Washburn Land Company.*

For the defendant *Bystrom* there was a brief by *Sanborn, Lamoreux & Pray* of Ashland, attorneys, and *Horace B. Walmsley* of Milwaukee, of counsel, and oral argument by *F. B. Lamoreux.*

KERWIN, J. It is established by the findings that D. M. Maxcy obtained a tax deed of the land in question on May 18, 1903, on sale of 1900 for the taxes of 1899, which deed was recorded June 26, 1905; that on or about June 17, 1905, Maxcy conveyed the land to defendant *Washburn Land Company;* that in December, 1907, the *Land Company* commenced an action against the plaintiff to quiet title to the northeast quarter of the southwest quarter and the undivided half of the northwest quarter of the southwest quarter of section 9, town 47 north, of range 5 west, under the tax deed and title above mentioned, the complaint being in the usual form, alleging that the land was vacant and unoccupied and no reference being made therein to the plaintiff's railroad being upon the tracts; that the summons and complaint were transmitted to the legal department of the plaintiff and by it referred to Mr. Bell, the land commissioner of plaintiff, with the inquiry as to whether the company had any interest in the land or defense to the action; that said land commissioner returned the summons and complaint and stated that the company had no interest in said land; that, relying upon and believing such information and not knowing that plaintiff's railroad ran over said land, the plaintiff executed the quitclaim deed and release of any interest it had in said land to the *Washburn Land Company,* the release and disclaimer being signed by the attorney for the company; that at the time of making said deed and for many years prior thereto and

up to the time of the trial of the action said Bell was land commissioner of plaintiff and in charge of its land-grant lands received from the state and the United States, but had not charge of lands owned by the company and used in the operation of its railroad and used for railroad purposes; that the company had a right-of-way commissioner who had charge of such lands; that the legal department did not refer the matter to the right-of-way commissioner, assuming that the land in question would have been in charge of the land commissioner if the company had any interest in it; that said deed and disclaimer were made by plaintiff under a mistake of the facts as to its interest in said land; that such mistake was not shared in, however, by the defendants, but the defendant *Land Company* was mistaken as to occupancy; that the plaintiff did not become informed of the fact that it owned the land at the time the quitclaim deed was given and that its railroad ran across it, and of the use it had made of it and was making of it, until about December, 1914; that the lands in question have been ever since 1899 assessed to the plaintiff and the tax paid by it, the assessment, however, excepting the right of way, usually three or four acres; that the defendant *Bystrom* in the fall of 1914 went upon the land and examined it with a view of purchasing for gravel purposes, and, supposing that the railroad company owned it, wrote to the land commissioner offering to purchase the northeast quarter of the southwest quarter, and received reply from the land commissioner, dated November 23, 1914, that the plaintiff did not own the land and had no interest in it; that defendant *Bystrom* thereupon, relying upon said information, after examining the records of ownership in the register of deeds' office, purchased the forty by warranty deed from the defendant *Land Company,* not knowing the circumstances under which the quitclaim deed was executed by the plaintiff to said *Land Company,* and paid therefor $400; that the said deed to *Bystrom* was executed

December 21, 1914, and recorded in March, 1915; that this deed made no exception of the railroad right of way and no reference thereto; that a mutual mistake was made in the deed from the *Land Company* to defendant *Bystrom* in not excepting plaintiff's right of way in said conveyance, and it was not intended by either of defendants that the main track, sidetrack, or switches located upon the premises at the date of said deed were to be conveyed thereby; and that so far as said deed covers said railway tracks, right of way, sidetracks, or switches of the plaintiff the same was a mutual mistake between the parties defendant.

The court further found that February 14, 1884, the plaintiff became the owner of all of section 9, township 47 north, range 5 west, and sold the same, except a strip 100 feet wide across said section upon which its railroad had been built; that in 1899 plaintiff dug test pits and found that the land in question contained sand and gravel suitable for repairs of its railroad, and in 1899 plaintiff bought the land in question; that the railroad track of the plaintiff ran easterly and westerly across said land; that for the purpose of taking out sand and gravel from the land in question adjacent to the track from time to time as needed for repairs of its track, plaintiff in the year 1899 laid a track extending southeasterly from the main track in a semicircular form for a distance of about 500 feet on the east forty, taking up some material that fall, and in the spring of 1900 took about 1,500 carloads of sand and gravel for the repair of its railroad; that in 1907 plaintiff constructed a "loading track," connected with its main track at the easterly side of the east forty and extending westerly on the southerly side of the main track a little less than fifty feet south of the center of the main track, 1,600 feet long, and took out with a steam shovel a strip of sand and gravel on the south side of said loading track about thirty feet in width extending the length of said loading track and used the same for the repair of its track,

the excavation being about twenty feet in depth; that in 1910 this loading track was thrown over south a distance of about twenty-five feet and fifty-one carloads of sand were loaded upon cars standing upon said track from the sand pit about 100 feet farther south; that said loading track has ever since 1910 remained in the same location where it was used that year, and in 1914 extended about 200 feet farther west, and a short track not connected with any other track was built at that time; that in 1899 plaintiff constructed a passing track on the south side of its main track, and at that time widened and filled the roadbed and put in and maintained a pipe culvert about the middle of the east forty, which culvert extends sixty feet south from the center of its main track; that at all times since the purchase of the south half of the northwest quarter of the southwest quarter plaintiff has occupied said tract of land by its main track and a portion of its passing track and roadbed; that in 1910 plaintiff sold timber from the northeast quarter of the southwest quarter, which timber was loaded upon cars on said loading track; that upon a few occasions during different years plaintiff has permitted cars to be loaded and unloaded upon said loading track.

The findings of fact are well supported and we shall spend no time in reviewing the evidence.

The court concluded that the deed issued to Maxcy on sale of 1899 became invalid by reason of failure by the grantee to obtain possession of the land within three years after recording the tax deed; that the quitclaim deed executed by plaintiff to the defendant *Land Company* in January, 1908, as well as the disclaimer made in the action, were invalid by reason of the mistake of the plaintiff in assuming that it did not have any interest in the land, and that said deed and the record thereof should be canceled so far as it pertains to the south half of the northwest quarter of the southwest quarter; that the defendant *Bystrom* was an in-

nocent purchaser of the northeast quarter of the southwest quarter, and that his title thereto should be confirmed and quieted except in so far as the deed to him from the *Land Company* attempts to convey the railroad right of way and tracks, which should be excepted and retained by plaintiff; and that this exception should include the original 100-foot strip and as much farther on each side as the sidetracks, grade, and culvert extend.

Judgment was ordered accordingly, with costs to defendant *Bystrom* against the plaintiff, and with costs in favor of plaintiff against the defendant *Land Company*.

1. On the appeal of defendant *Land Company* it is contended that the court erred in not finding that the plaintiff's officers, in executing the release and quitclaim, were inexcusably negligent, and in holding that the release and quitclaim to the *Land Company* were void by reason of mistake of the plaintiff.

The argument is that the plaintiff did not make sufficient investigation as to whether it had title before making the disclaimer and giving the quitclaim deed; it voluntarily settled the action, therefore is not entitled to relief; that there was no fraud and no such mistake as equity will relieve against.

We do not think the officers of the plaintiff can be said to be guilty of a want of ordinary care in not discovering that the plaintiff did own the land. When the action was commenced by defendant *Land Company* to quiet title the matter was referred to the legal department of the plaintiff. If the plaintiff had no interest in the land and no defense, it was necessary to disclaim in order to avoid the payment of costs. The legal department at once referred the matter to the land commissioner, who had general charge of the plaintiff's lands, and who informed the legal department that the plaintiff had no interest in the land. The officers of the legal department of plaintiff acted upon this information, dis-

claimed, and also gave a quitclaim deed. It appeared, however, that this particular land was in charge of the right-of-way commissioner, and the land commissioner of whom inquiry was made had no knowledge that the plaintiff owned it. It also appears that the plaintiff at the time owned a very large amount of land in Wisconsin. We are convinced upon the whole record that the court below was not in error in failing to find that the officers of the plaintiff were inexcusably negligent in executing the release and quitclaim deed.

We think no error was committed in holding that the release and quitclaim were void by reason of mistake of the plaintiff. It is well settled that equity, in a proper case, will relieve against mistake. The instant case is not one of settlement or compromise of a disputed right or claim. It is a clear case of mistake, and a mistake on the part of the plaintiff here which is excusable. It is not necessary that fraud be shown. Nor is it necessary that the mistake be mutual in all cases. In order to reform a contract on the ground of mistake the general rule is that the mistake must be mutual, or mistake on one side and fraud on the other. But where one deeds his property to another without consideration through mistake, equity will, in a proper case, grant relief by rescission. 9 Cyc. 394; *Clemens v. Clemens,* 28 Wis. 637; *Hurd v. Hall,* 12 Wis. 112; *Johnson v. Parker,* 34 Wis. 596; *Rider v. Powell,* 28 N. Y. 510; *Smith v. Mackin,* 4 Lans. (N. Y.) 41; 1 Story, Eq. Jur. (12th ed.) § 138*i*.

The authorities generally hold that equity will grant relief by rescission in proper cases for the mistake of one party as readily as for mutual mistake, where it is shown that it would be contrary to equity and against conscience to allow the enforcement of the contract.

Counsel seems to rely upon *Grant M. Co. v. Abbot,* 142 Wis. 279, 124 N. W. 264. A careful examination of that case will show that it does not support the contention. In that case relief was sought upon the ground of reformation

on account of mistake of one party in a detail of the contract and a promise, express or implied, to pay for work in the sixth story. The idea of the pleader was to state a cause of action for reformation on the ground of mutual mistake. No case of reformation was made, and the trial court allowed for the value of work done, not exceeding contract rates. The contract was made which the parties intended to make. The mistake which it was claimed gave right to rescission only went to a detail of the contract and was occasioned by the negligence of plaintiff, so the case is in no way in point here. 9 Cyc. 294.

We shall spend no more time discussing cases or referring to the established facts. It is sufficient to say that the instant case meets all the calls of a court of equity entitling the plaintiff to rescission for mistake.

The defendant *Land Company* did not plead a counterclaim asking that its title be quieted, but on stipulation all questions respecting the title of defendant *Land Company* as well as that of plaintiff were tried and determined below.

The court below held that the Maxcy tax deed, through which the defendant *Land Company* claimed, was void for failure of the *Land Company* to obtain possession of the land covered by such deed within three years after recording of said tax deed. It is further claimed, however, that there was no occupancy of the land in question from the time of the recording of the tax deed, May 18, 1903, and 1907, so that the tax deed carried constructive occupancy. It is said that there was occupancy except of the right of way. The court below found that the land was occupied by plaintiff outside of the right of way and there is ample evidence to support the finding.

Under the findings of the court below, sustained by the evidence, the tax deed was void under secs. 1187 and 1188, Stats., because the land was occupied by plaintiff and it had retained possession for more than three years after recording

of the tax deed, the possession of a part being possession of the whole. *Laffitte v. Superior,* 142 Wis. 73, 125 N. W. 105; *Vicker v. Byrne,* 155 Wis. 281, 143 N. W. 186. We are therefore of opinion that the tax deed to the *Land Company* was invalid and that the release and quitclaim were given by the plaintiff under mistake as to the plaintiff's interest in the land, and that such deed and release should be set aside as to the south half of the northwest quarter of the southwest quarter of section 9, town 47 north, of range 5 west.

The *Land Company* also complains about judgment against it for costs. The action is in equity and some at least of the important issues in the case were contested by the *Land Company,* notably the validity of the Maxcy tax deed and the validity of the release and quitclaim to it in the suit by the *Land Company* to quiet title. Costs in such cases are in the discretion of the court, and we cannot say that the discretion of the court was abused.

2. The only remaining question is whether the title of defendant *Bystrom* to the northeast quarter of the southwest quarter of section 9, town 47 north, range 5 west, should be confirmed in him. The court below held that *Bystrom* was an innocent purchaser and quieted title in him. The court found "that *Bystrom* did all that an ordinarily careful person would usually do in ascertaining what interest or right the company claimed in the land." The record title appeared to be in the *Land Company,* and *Bystrom* examined the title before he purchased. He also examined the land and found some evidence of plaintiff's possession and inquired of plaintiff's land commissioner as to what the rights of plaintiff were, and was informed that plaintiff did not own the land.

It is clear upon the established facts that the right of way of the plaintiff over the land in question did not pass by the deeds to either of the defendants. *Kutz v. McCune,* 22 Wis. 628; *Smith v. Hughes,* 50 Wis. 620, 7 N. W. 653; *State ex*

rel. Att'y Gen. v. Frost, 113 Wis. 623, 88 N. W. 912, 89 N. W. 915.

It follows that the court below was right in holding that defendant *Bystrom* got a good title to the northeast quarter of the southwest quarter of section 9, town 47 north, range 5 west, except the right of way of the plaintiff 130 feet wide across said land, as described in the findings and judgment.

By the Court.—The judgment is affirmed on both appeals.

RUSSELL TIMBER COMPANY, LIMITED, Appellant, vs. KENFIELD-LAMOREAUX COMPANY and another, Respondents.

January 16—February 13, 1917.

Ownership of timber found afloat: Question for jury: Evidence: Harmless error.

1. Whether certain timber found floating in Lake Superior and alleged to have been converted by defendants belonged to the plaintiff is *held*, upon the evidence, to have been a question for the jury.
2. The erroneous admission of immaterial evidence will not work a reversal of a judgment based on the verdict of a jury, where that verdict would have been the same if such evidence had been excluded.

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Appellant brought suit to recover the value of certain spruce pulpwood afloat in Lake Superior, alleged to have been taken into possession and converted by respondents. Respondents denied the conversion. There was a trial and a special verdict by the jury, by which the jury found that none of the timber alleged to have been converted by the defendants belonged to the plaintiff. There was a motion to set aside the verdict, a motion for a new trial, and a motion

for judgment upon the verdict. The court granted defendants' motion for judgment upon the verdict and judgment was entered dismissing plaintiff's complaint upon the merits. From this judgment plaintiff appeals.

For the appellant there were briefs by *Sanborn, Lamoreux & Pray* of Ashland, and oral argument by *A. W. Sanborn* and *Frank B. Lamoreux.*

For the respondent *Kenfield-Lamoreaux Company* there was a brief by *Walsh & Morris* of Washburn, and oral argument by *Charles F. Morris.*

For the respondent *Johnson* there was a brief by *Spencer & Spencer* of Duluth, Minnesota, and oral argument by *R. W. Spencer.*

ROSENBERRY, J. The main contention of the appellant is that there was not sufficient evidence to sustain the verdict to the effect that none of the timber converted was the property of the plaintiff, and that the undisputed testimony establishes the identity of the timber in question, and that judgment should have gone in favor of the plaintiff for its value.

The consideration and determination of this question involve wholly matters of fact. In order to make an intelligible presentation of the evidence a very long and complicated statement of the facts would be necessary. In view of the fact that the conclusion we have reached will result in a final determination of the case, such a statement could be of interest only to the parties immediately concerned and their attorneys and would be of no value in any other case. Therefore we will only say that we have carefully examined the voluminous record and we are agreed that the evidence presented a jury question which was determined adversely to the plaintiff, and we cannot say that the trial court was clearly wrong in not setting aside the verdict of the jury.

Appellant very strenuously insists that its rights were prejudiced by the introduction of certain evidence relating

to salvage and certain remarks of the trial court with respect thereto. We have also carefully considered this assignment of error, and, while the evidence referred to was immaterial and not properly in the case, it could in no way have prejudicially affected the determination of the jury to the effect that the property in question was not that of the plaintiff. When the jury found that it was not plaintiff's property, all questions relating to abandonment, salvage, and other claims and counterclaims of like character dropped out of the case, and it does not appear that the result would have been different had the evidence complained of been excluded. After a thorough examination of the evidence we are of the opinion that a finding either way could have been sustained. It being a pure question of fact, the finding of the jury cannot and should not be disturbed.

By the Court.—Judgment affirmed.

STATE EX REL. MALOUF, Administratrix, vs. MERRILL, Acting Judge.

January 16—February 13, 1917.

Appeal: Undertaking, when not required: Attorney not bound to furnish, though prosecuting for contingent fee and having lien on recovery.

Although a tort action is being prosecuted by plaintiff's attorneys under a contract, made pursuant to secs. 2591*a*, 2591*m*, and 2591*n*, Stats., that their fees shall be contingent on the result and that they shall have a lien on the cause of action and on the damages recovered, and although said attorneys are able to furnish the undertaking required by sec. 3052 on appeal, they are not to be considered as in effect parties to the action, and so liable for costs or bound to furnish such undertaking, especially in view of sec. 2590, which prohibits attorneys from becoming sureties for their clients; and if the plaintiff is unable to furnish the undertaking, he is entitled to a certificate of that fact as provided in sec. 3052*m*, and the undertaking need not be given.

MANDAMUS. Original action in this court. Upon petition of relator an alternative writ was issued by this court. The facts set forth in the petition, omitting the merely formal allegations and stating only those material to a determination of the issue, are as follows: Richard Malouf, a child under four years of age, was killed by one of the cars of the Wisconsin Public Service Company. His mother, *Florence Malouf,* was appointed administratrix of his estate, and commenced an action against the Service Company for damages. The result of the trial was a verdict by the jury in favor of the Service Company. Upon motion for a new trial the municipal court, acting through *Carlton Merrill,* denied the motion and rendered judgment in favor of the Service Company. Thereafter the administratrix obtained an order to show cause why the acting municipal judge should not issue the certificate provided by sec. 3052*m,* Stats., and directed to be issued upon an appeal to the supreme court when it appears that the appellant is unable to give the bond otherwise required by law. Upon the hearing of this order to show cause *Florence Malouf,* the administratrix, and the Service Company entered into a stipulation of facts, upon which stipulation the question as to whether or not a certificate should be issued was submitted to the acting municipal judge. In addition to the foregoing facts briefly stated, the stipulation set forth

"That William Malouf is the father of said deceased and the husband of the plaintiff, living with her, and is a laboring man earning no more than is necessary to provide for the support of the plaintiff and his family and that he has no money, means, or property other than his daily wage;

"That the estate of Richard Malouf has no money, means, or property of any kind, nature, or description whatsoever, except the cause of action for his death as aforesaid;

"That said plaintiff, *Florence Malouf,* is wholly without money, means, or property of any kind, nature, or description whatsoever, other than her interest in the cause of action aforesaid;

"That this action was commenced, maintained, and prosecuted by the said plaintiff under a contract and agreement duly entered into between her and Minahan & Minahan, her attorneys, to prosecute the same on a contingent fee, and wherein and whereby such attorneys have been duly given a lien upon such cause of action and upon the proceeds or damages derived in such action, as security for their fees in the conduct of such litigation, and that such fees are contingent upon the result of said action and consist of a certain percentage and part of any proceeds or damages recovered in said action; and that said contract is the contract, and the lien given to said attorneys is the lien, provided for in secs. 2591*a*, 2591*m*, and 2591*n* of the Wisconsin Statutes, and that said attorneys are financially amply able to furnish the undertaking required by sec. 3052 of said statutes, on appeal, or to purchase the same from a bonding company;

"That the plaintiff and her said husband are unable to furnish said undertaking unless the same is furnished by the said attorneys; and that said attorneys for the plaintiff refuse to and will not furnish or provide the undertaking required by said sec. 3052.

"Dated September 28, 1916."

Upon an order to show cause *Judge Merrill* refused to issue the certificate, holding that it was the duty of the attorneys in the case to give the bond. Thereupon an alternative writ of *mandamus* was issued by this court upon the petition of the relator, and respondent demurred.

For the relator there was a brief by *Minahan & Minahan* of Green Bay, and oral argument by *V. I. Minahan.*

For the respondent there was a brief by *Greene, Fairchild, North, Parker & McGillan* of Green Bay, and oral argument by *James H. McGillan.*

ROSENBERRY, J. The material part of sec. 3052*m*, Stats., is as follows:

"The bond required by section 3044 of the statutes on the issuance of a writ of error and the undertaking required by section 3052 of the statutes on an appeal shall not be re-

quired if . . . the party desiring the writ of error or the taking of an appeal is unable to furnish such bond or undertaking; provided, however, that such certificate shall not be made except upon notice to the parties interested."

The trial court in its decision said:

"My findings are intended to establish that the plaintiff, her husband, and the estate of Richard Malouf, deceased, are each of them, jointly and severally, unable to furnish said undertaking unless the same is furnished by said attorneys for the plaintiff, who are amply able so to do.

"The sole question before me, therefore, is: Is the plaintiff, who has made a contract with her attorneys to prosecute her action for a contingent fee, in this state, where the statute recognizes such contracts as valid and gives the attorney a lien for his fee on the cause of action and the proceeds recovered by judgment or settlement, entitled to the certificate that she is unable to furnish the undertaking required by sec. 3052 of our statutes on appeal?"

"I will refuse to make the certificate solely upon the ground that the attorneys for plaintiff have a beneficial interest in the result of the action and easily can furnish the necessary undertaking on appeal, and the facts, as found above, do not bring the plaintiff within the terms of sec. 3052*m*."

Secs. 2591*a* and 2591*m* are as follows:

"Section 2591*a*. Any person having or claiming a right of action, sounding in tort or for unliquidated damages on contract, may contract with any attorney to prosecute the same and give such attorney a lien upon such cause of action and upon the proceeds or damages derived in any action brought for the enforcement of such cause of action, as security for his fees in the conduct of such litigation; when such agreement shall be made and notice thereof given to the opposite party or his attorney no settlement or adjustment of such action shall be valid as against the lien so created, provided that such agreement for fees shall be fair and reasonable, and this section shall not be construed as changing the law in respect to champertous contracts."

"Section 2591*m*. If any such cause of action shall have

been settled by the parties thereto after judgment has been procured without notice to the attorney claiming such lien, such lien may be enforced and it shall only be required to prove the facts of the agreement by which such lien was given, notice to the opposite party or his attorney and the rendition of the judgment, and if any such settlement of the cause of action is had or effected before judgment therein, then it shall only be necessary to enforce said lien to prove the agreement creating the same, notice to the opposite party or his attorney and the amount for which said case was settled, which shall be the basis for said lien and it shall at no time be necessary to prove up the original cause of action in order to enforce said lien and suit."

It is urged on behalf of the respondent that secs. 2591*a* and 2591*m* in effect make the attorneys for a suitor circumstanced as therein stated parties to the action; that the prosecution of the appeal is partially at least for the benefit of the attorneys, and that therefore, where able to do so, they should be required to furnish the security required by the statute. Such was the holding in *Feil v. Wabash R. Co.* 119 Fed. 490; *Esquibel v. A., T. & S. F. R. Co.* 206 Fed. 863; and *Silvas v. Arizona C. Co.* 213 Fed. 504.

"Section 2590. No attorney practicing in this state shall be taken as bail or security on any undertaking, bond or recognizance in any action or proceeding, civil or criminal, nor shall any practicing attorney become surety on any bond or recognizance for any sheriff, constable, clerk of court or justice of the peace."

At common law it was champertous and illegal for a lawyer to encourage litigation by agreeing to bear the costs thereof and to receive no compensation except in case of recovery. *Stevens v. Sheriff,* 76 Kan. 124, 90 Pac. 799, 11 L. R. A. N. S. 1153. However, by legislative enactment attorneys are given a lien upon the cause of action to secure payment of their fees, and this irrespective of whether or not the lawyer will be compensated in the event his client does not recover. We think, however, having in view the purpose

of the statute, that it was not the legislative intent that attorneys at law under such circumstances should thereby in effect be made parties to the action and so liable for costs. Such a construction ignores entirely the provision of sec. 2590 which prohibits attorneys from becoming sureties for their clients. While we do not question the wisdom of the legislature, we are not disposed to extend the statute beyond its plain terms. The statute requires the *party* desiring the writ of error or the taking of the appeal to furnish the security or to make a showing that he is unable to do so. We are of the opinion that under such circumstances as are shown by this record the attorneys are not parties to the action and that the effect of the statute is not to make them such, but simply to secure to them fair and just compensation for services rendered to worthy but indigent clients.

By the Court.—The demurrer to the petition is overruled.

CASE, Respondent, vs. MEANY, Appellant.

January 17—February 13, 1917.

Fire insurance: Placing insurance in unlicensed company: Liability: "Sole and unconditional ownership" of premises insured: Land contract: Avoidance of policy.

1. Under sec. 1919*f*, Stats., imposing a contingent liability upon any person who shall "solicit or place insurance" in a fire insurance company not authorized to do business in this state, one who so places insurance, even though he did not solicit it, is subject to such liability.
2. Where the insured was in possession under a land contract which would entitle him, on payment of a certain sum, to an absolute conveyance of the premises, and had paid the accruing interest, and nothing had been done to forfeit or lessen his rights, he was in such a position that the proceeds from the policy would belong to him and was the sole and unconditional owner of the premises within the meaning of the policy.
3. Where in such case there was no concealment or misrepresentation as to any facts concerning the title when the policy was issued, the policy could not be avoided by the insurance company.

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

The appeal is from a judgment in favor of the plaintiff.

J. P. Thern & Co. owned certain premises in the city of New London with a grist mill and machinery thereon and upon which there were insurance policies to the extent of $3,500, one for $2,000 in the German Fire Underwriters and $1,500 in another company, neither of which companies was licensed to do business in Wisconsin. In October, 1914, the plaintiff acquired the property, mill, and machinery by a trade. He desired only $2,000 insurance, and by agreement with Thern & Co. arrangements were made through defendant, who was then acting for his son, who had procured the original $3,500 of insurance, by which the old policies were surrendered, premiums adjusted, and a new policy for $2,000 issued and delivered to plaintiff, he then paying the balance required on the premium. The arrangement for the change of the policies was made by defendant with a Chicago broker who represented these unlicensed companies.

A jury was waived, and the circuit court found that at the time the policy was issued and when the fire occurred the legal title was in one Henry Gorges, subject to an outstanding contract to convey upon payment of $1,200, and that such legal title was held solely as security for the payment of said $1,200. The court stated in his written decision that all accrued interest on the $1,200 has been paid and that no forfeiture of the contract has been declared nor foreclosure begun. He also found that plaintiff was entitled to a conveyance upon the payment of the $1,200 and that he was the sole and unconditional owner of the property. A further finding was to the effect that no misrepresentations were made or facts withheld or concealed by plaintiff concerning the title.

The court determined that defendant, having placed this insurance with an unlicensed insurance company, which

would have been liable but nevertheless refused to pay the loss, became liable under sec. 1919*f*, Stats., and ordered judgment accordingly, from which judgment defendant appeals.

The cause was submitted for the appellant on the brief of *Isaac Craite* and *Nash & Nash,* all of Manitowoc, and for the respondent on that of *Kreutzer, Bird, Okoneski & Puchner* of Wausau.

ESCHWEILER, J. The part of sec. 1919*f*, Stats., which is material for consideration on this appeal is as follows:

"Any company or person who shall *solicit or place insurance* in a fire insurance company not authorized to do business in this state shall, in the event of the failure of such unauthorized company to pay any claim or loss within the policy issued, be liable to the insured for the amount thereof to the extent that such company would have been liable."

It is argued that in order to sustain liability under this law an insurance agent must be found to have both solicited and placed the insurance with such unauthorized company, and that where the evidence discloses that he did not solicit the insured to give the insurance, but merely placed such insurance at the request of the insured, the terms of the statute fixing liability have not been met. In other words, that the phrase "solicit or place insurance" must be read "solicit *and* place insurance."

We are satisfied, however, that the statute is aimed to protect those who have had their insurance placed with an unauthorized company and who thereby suffer damage through nonpayment of the fire loss. It was the act of the defendant to give this insurance to a company which did not comply with the requirements of the Wisconsin statutes regulating insurance companies, instead of placing it with some authorized company or refusing to place it at all, thereby avoiding this penalty.

It is further urged that the plaintiff was not the sole and unconditional owner of the premises in question. The record chain of title is not clear and satisfactory, but sufficient does appear to support the finding of the court that plaintiff was the holder by mesne conveyance of a land contract which would entitle him, on payment of $1,200, to an absolute conveyance of the same. He paid the accruing interest and nothing had been done to forfeit or lessen his rights. He was therefore in such a position that the proceeds from the policy would have belonged to him. *Johannes v. Standard Fire Office,* 70 Wis. 196, 35 N. W. 298; *Evans v. Crawford Co. F. Mut. F. Ins. Co.* 130 Wis. 189, 193, 109 N. W. 952.

The court below was satisfied, and there is ample evidence to sustain it, that there was no concealment or misrepresentations by plaintiff at the time of the issuing of the policy as to any facts about the title. The policy could not, therefore, have been avoided by the insurance company. *Vankirk v. Citizens' Ins. Co.* 79 Wis. 627, 48 N. W. 798; *Kludt v. German Mut. F. Ins. Co.* 152 Wis. 637, 644, 140 N. W. 321.

By the Court.—The judgment of the circuit court is affirmed.

ROSENBERRY, J., took no part.

ZIMMERMAN, Respondent, vs. ZIMMERMAN and wife, imp., Appellants.

January 17—February 13, 1917.

Deeds: Delivery to third person: Control retained by grantor: Wills.

1. **A deed may be delivered by the grantor to a third person for the benefit of the grantee and possession and enjoyment by him of the property involved be postponed until the happening of some special event, such as the death of the grantor, but it is essential that the grantor should absolutely part with control of the instrument and that it should take effect as his deed when so delivered.**

2. Findings of the trial court in this case to the effect that a deed of certain land to the grantor's son, to take effect at her death, and other instruments conveying the rest of her property, all of which were signed by the grantor and placed in the hands of a third person to be retained by him until her death, were intended by her as a testamentary disposition of her property; that she intended to retain control of said instruments, with power to make (as she afterwards did by will) a different disposition of the property; and that a delivery of the deed by the depositary to the grantee was unauthorized, are *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Lincoln county: A. H. REID, Circuit Judge. *Affirmed.*

Action to remove a cloud on title, tried with the following result as to facts: Augusta Zimmerman died April 8, 1915. She then resided on a farm composed of land described in the complaint. She had been a widow since 1901 and for years had operated the farm, assisted by plaintiff, her son *John Zimmerman,* who was unmarried and resided with her, and also by her son Herman, an incompetent and under guardianship. She derived title from her husband, who predeceased her. February 8, 1901, the deed of the land involved was deposited with one Braun, to be delivered to her in case she survived the grantor, or to the latter in case he survived her. After he died it was delivered to her and recorded. April 10, 1908, she was ill and, supposing she might soon decease, desired to make disposition of her property. Plaintiff was under bond to appear in court, shortly, to be tried upon the charge of murder. She had intended to leave him the farm, charged with the support of Herman, but, because of the pending trial, thought a different disposition necessary. She consulted Braun, her friend and business advisor, and Mr. Van Hecke, an attorney, and directed the latter to prepare (a) a deed to her son *Otto,* to be executed by her, of all the land described in the complaint, including the personal property on the farm, (b) a deed to her son Paul of two city lots, (c) a bill of sale to her children, except Herman, of her household goods, Herman to have his

bed; also, to be executed by *Otto,* a $2,000 note to Herman, a mortgage to secure it on a designated part of the land, (d) a $650 note to plaintiff, (e) a $300 note to Charles Zimmerman, (f) a $300 note to Fred Zimmerman, (g) a $150 note to Paul Zimmerman and a $100 note to Richard Zimmerman. She also had prepared a writing between herself and Braun for the transfer to him of some certificates of deposit for $350, and a $50 note, and delivered to him some money to be used for payment of expenses in the criminal matter, the residue, if any, to be used for her funeral expenses. The instruments covered all her property. She executed all papers prepared therefor and placed them in the hands of Braun and Van Hecke, directing them to have the other papers executed and to retain all in the hands of one or the other and not allow any recording during her lifetime. She intended to thus retain control of the papers so they would not become effective until her death. The papers were taken to Van Hecke's office, and, in due course, *Otto,* his wife joining, executed those prepared therefor. The deed to *Otto* was delivered to him and, later, the deed to Paul was delivered to him. Such deliveries were unauthorized by Mrs. Zimmerman. The papers so delivered were handed back and remained on deposit in Van Hecke's office, subject to the control of Mrs. Zimmerman until her death and until the latter part of August, 1915. Neither the mortgage nor any of the notes were ever delivered to any of the payees. The personal property was not delivered. After the death of Mrs. Zimmerman there was an offer to deliver the notes but all parties, except Richard Zimmerman, rejected the offer. Mrs. Zimmerman intended to make a testamentary disposition of her property. *Otto,* up to the decease of his mother, supposed the deed to him was subject to her recall. April 8, 1908, the plaintiff was acquitted of the charge against him. His mother soon recovered. She, plaintiff, and Herman continued to reside on the farm and, in the

course of time, she recurred to her former intention of leaving her property, in the main, to plaintiff charged with the support of Herman. She attempted to secure a return of the deeds by applying to Braun and obtaining a bundle which she had left with him for safe keeping but did not obtain the particular paper. March, 1915, she was taken ill. Then, in due form, she disposed of her property by will, ignoring the previous transaction. In due course the will was probated. All the children had notice thereof and made no objection. Thereby, the title to the real estate in question was vested in plaintiff, subject to a charge in favor of Herman.

Upon such facts the court concluded that the first transaction was an attempted, ineffectual disposition of property; that if it were otherwise than of testamentary character, it was ineffectual for want of delivery of the notes and mortgage securing the same; and that plaintiff was entitled to judgment establishing title to the real estate under the will and for costs against *Otto.*

All defendants, except *Otto* and his wife, disclaimed and dropped out of the case as contestants.

The deed to *Otto* expressly provided that it should not take effect until the grantor's death. There was no express direction by the grantor to deliver the deed and receive it back to be kept as was done. There was evidence to the effect that Mrs. Zimmerman told Mr. Van Hecke she wanted the property to go as indicated in the deed to *Otto;* that she wanted the former to carry out her wishes, the deed not to take effect until she died, and that he acted as he supposed she desired.

Judgment was rendered in accordance with the conclusions aforesaid and defendants, *Otto Zimmerman* and wife, appealed.

For the appellants there was a brief by *F. J. & A. H. Smith* of Merrill, and oral argument by *A. H. Smith.*

For the respondent there was a brief by *Runke & Naffz* of Merrill, and oral argument by *R. B. Runke.*

MARSHALL, J. It is conceded, as the fact is, that unless Mrs. Zimmerman delivered the deed to Mr. Van Hecke, or Mr. Braun, intending to absolutely part with control thereof so it would take effect, *in præsenti,* as her deed, but enjoyment of the property by the grantee be postponed until her death and his then coming into manual possession of the paper, it was of mere testamentary character and void. While a deed may be delivered by the grantor to a third person for the benefit of the grantee and possession and enjoyment by him of the property involved be postponed until the happening of some specified event, such as the death of the grantor, it is essential that the latter should absolutely part with control of the paper and that it should take effect as his deed when so delivered. *Albright v. Albright,* 70 Wis. 528, 36 N. W. 254; *Kittoe v. Willey,* 121 Wis. 548, 99 N. W. 337; *Williams v. Daubner,* 103 Wis. 521, 79 N. W. 748; *Ward v. Russell,* 121 Wis. 77, 98 N. W. 939; *Dickson v. Bills,* 144 Wis. 171, 128 N. W. 868; *Campbell v. Thomas,* 42 Wis. 437.

This court said in *Prutsman v. Baker,* 30 Wis. 644, "An essential characteristic and indispensable feature of every delivery, whether absolute or conditional, is, that there must be a parting with the possession and of the power and control over the deed by the grantor for the benefit of the grantee, *at the time of delivery;*" and in *Williams v. Daubner, supra,* "The principle emphasized is that the delivery of the deed not being absolute, or conditional so as to be beyond the grantor's control, and the depositary being a mere agent, the instrument is revocable at any time before the grantor's death, and is therefore a nullity."

The trial court determined this case with a clear understanding of the law applicable thereto. The only question

now presented is whether the findings of fact against intention to make delivery so as to pass title are against the clear preponderance of the evidence. The circuit judge, as indicated by a carefully written opinion, weighed the evidence in all its aspects and concluded that Mrs. Zimmerman intended to retain control of the deed until her death. There are many circumstances referred to in the findings tending to sustain that view. She derived her claim of title by a deed deposited by her husband with the Mr. Braun who advised her in the particular transaction, and delivered to her after the grantor's death, he, apparently, retaining control of it until that event. She purposed, as the circumstances characterizing the making and depositing of the deed in question indicated, having it dealt with in the same way. She said to Mr. Van Hecke, as he testified, that she did not wish the deed to take effect until she died, showing that she did not have in mind a present parting with title and postponement of enjoyment by the grantee until her decease. The deed expressly provided that it should not take effect until she died. When the particular condition which moved her to make the deed no longer existed, she attempted to regain possession of it and supposed she had succeeded. Subsequently she made a will, entirely ignoring the deed. Her conduct, from first to last, rather indicates that she did not intend to part with control of the deed when she left it with Mr. Braun or Mr. Van Hecke. The fact that the latter got a different idea from the transaction is not controlling. The conduct of the grantee from the time the deed was made until some time after the will was admitted to probate, indicates that he did not suppose she had parted with control of the deed. He had notice of the probate proceedings and contents of the will and did not raise any question in respect to the matters until a late day.

The circumstances referred to and others shown by the evidence support the view of the trial court that Mrs. Zim-

merman did not part with possession of the deed with any thought of presently making the same a conveyance to the grantee named therein; that she purposed retaining competency to make some other disposition of her property in case she should desire to do so.

In view of what has been said, it is considered by the court that the record does not warrant holding that the findings of fact are contrary to the clear preponderance of the evidence. The judgment must therefore be affirmed.

By the Court.—The judgment is affirmed.

HOBE, Appellant, vs. RUDD and others, Respondents.

January 17—February 13, 1917.

Tax titles: Limitation on former owner: When notice to be given by tax-deed grantee: Statute construed: Sufficiency of description in tax deed: "Undivided one-half:" Tenants in common: When one may acquire cotenant's title.

1. That part of sec. 1189, Stats., as amended by ch. 440, Laws 1913, beginning "The tax deed grantee or his assigns may, at any time after the tax deed is issued and recorded, serve a notice on the owner," etc., does not relate to all tax deeds, but applies only to cases where, as stated in the preceding clause, "a single tax deed only has been issued and the original owner has, before the issuance of such tax deed, paid all taxes levied against the land for the three years ensuing after the year for which the land was returned delinquent and sold."
2. Where a tax deed purported to convey an "undivided one-half" of certain land, reference might be had to the proceedings upon which the tax sale was based in order to ascertain which particular undivided half was sold; and where it appeared therefrom that the grantee in the tax deed as owner of one undivided half of the land had paid the taxes thereon, it necessarily followed that the other undivided half was what was sold and the description in the tax deed was sufficiently certain under sec. 1047, Stats.
3. One tenant in common of unoccupied lands may acquire the title of his cotenant by tax deed, where they derived their interests under separate instruments and there was no relationship between them other than that of mere tenancy in common.

APPEAL from a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Reversed.*

Action to quiet title. The plaintiff brought this action to quiet title to certain lands in Jackson county, and alleged that he was the owner thereof in fee simple; that the lands were vacant and unoccupied; that the defendants claimed an interest or estate in said premises or lien thereon adverse to the plaintiff; and that they in truth and in fact had no such interest or estate. He asked that his title be quieted. The defendants answered admitting that the lands were vacant and unoccupied, and denied the ownership of the plaintiff. The defendant *First Trust Company* alleged that it was the owner of a certain mortgage upon an undivided one-half interest; that plaintiff's claim to title to said interest is based upon a tax certificate for taxes assessed against said premises; that plaintiff acquired said tax certificate while he and the defendant *Wisconsin Farm Land Company* were owners of said lands as tenants in common; and generally denied the allegations of plaintiff's complaint. There was judgment for the defendants, and plaintiff appeals.

E. S. Jedney of Black River Falls, for the appellant.

For the respondents there was a brief by *Miller, Mack & Fairchild,* and oral argument by *Bert. Vandervelde,* all of Milwaukee.

ROSENBERRY, J. But two questions are presented by this record: (1) The construction to be placed upon sec. 1189, Stats. (2) Was the tax deed which was the basis of plaintiff's claim void upon its face for uncertainty of description?

"Section 1189. The limitation for bringing actions as provided in section 1188 shall not apply to any person who shall be a minor at the time the right of such action shall accrue, but such minor may bring such action or actions after the time limited at any time during his minority and within one year thereafter; nor shall such limitation nor any other limitation in favor of a tax deed or a tax certificate, except in case of actual possession founded on a tax deed, apply where

the taxes, for the nonpayment of which the land was sold and the tax deed executed, were paid prior to the sale, or where the land was redeemed from the operation of such sale as provided by law or where the land was not liable to taxation; nor shall such limitation apply where a single tax deed only has been issued and the original owner has, before the issuance of such tax deed, paid all taxes levied against the land for the three years ensuing after the year for which the land was returned delinquent and sold, except as herein provided. The tax deed grantee or his assigns may, at any time after the tax deed is issued and recorded, serve a notice on the owner of record of the original title, stating that he holds a tax deed on the land of such original owner and giving a description of the land so deeded and a reference to the volume and page where such deed is recorded, which notice shall be served in the same manner as a summons in a court of record and proof of which service shall be filed in the office of the county clerk of the county in which the lands are situated. If such notice be served and filed thirty days or more before the expiration of three years from the date of recording the tax deed, the limitation provided by section 1188 shall apply. If such notice is not so served and filed, the limitation provided by said section 1188 shall be extended until the expiration of thirty days from and after the day such notice is served and filed. In any action brought by the original owner to set aside such tax deed after the service and filing of the notice aforesaid, the original owner, in case he prevails, shall as a condition of relief pay to the tax deed claimant the sum of five dollars for each description and the costs of serving the aforesaid notice, in addition to all other costs and charges now provided by law. The provisions of law regulating costs and charges for the service of a summons in a court of record shall apply to and govern the amount that may be charged for the service of such notice."

Does that part of sec. 1189 beginning "The tax deed grantee or his assigns may, at any time after the tax deed is issued and recorded, serve a notice on the owner," etc., relate to all tax deeds, or does it apply only to cases where a single tax deed has been issued and the original owner has before the issuance of such tax deed paid all taxes levied

against the land for the three years ensuing after the year for which the lands were returned delinquent and sold? If the latter part of the section does not apply in the instant case, the limitation provided by sec. 1188 applies here, and the deed is valid so far as the regularity of the tax proceedings is concerned.

It is a matter of common knowledge that, in many instances where there is a single outstanding tax claim, the original owner, having paid the taxes prior thereto and those subsequently, is totally ignorant of any outstanding tax lien. The situation is well illustrated in the case of *Washburn L. Co. v. White River L. Co., ante,* p. 112, 161 N. W. 547. In that case the original owners had paid the taxes for many years both before and after the year for which the taxes were returned delinquent and the land was sold. The tax receipt had been misplaced. So we have no doubt that the mischief intended to be remedied by the amendment adopted by ch. 440, Laws 1913, was that original owners should not lose title to their property through inadvertence, and that the legislature intended to require in that particular case that the limitation provided for by sec. 1188 should not apply unless the notice required by the amendment should be served. As the statute stood prior to the amendment it closed with the words "or where the land was not liable to taxation." If it was intended that the language beginning "The tax deed grantee," etc., should apply to all tax deeds, there was certainly no necessity for specifying that the limitation should not apply where a single tax deed only was issued, and the amendment might very properly have been made to sec. 1188.

The respondents discuss at considerable length the effect of certain irregularities in the tax proceedings. The defendants not having paid the taxes for the three years ensuing after the sale of the lands for taxes, the limitation provided for in sec. 1188 applies, and the conclusiveness and legality of the prior tax proceedings cannot now be brought in question.

Is the tax deed void upon its face? The description contained in the tax deed was as follows:

"The following described piece or parcel of land, lying and being situated in the county of Jackson, state of Wisconsin, to wit: Undivided one-half of the southwest quarter and undivided one-half of the southwest quarter of the southeast quarter of section 11, township 21 north, range 1 west."

It appears that prior to the issuance of the tax deed an undivided one-half interest in the land was owned by the plaintiff, the other undivided one-half interest being owned by the defendant *Wisconsin Farm Land Company.* Plaintiff paid the taxes upon his undivided one-half interest thereof, and the defendant *Wisconsin Farm Land Company* failed to pay its tax. The lands were subsequently sold for taxes, a certificate purchased by the plaintiff, the tax deed in question issued thereon, and it is said the deed is void upon its face for uncertainty in the description, in that the deed does not designate which particular undivided one-half interest was sold. Appellant argues, and we think correctly, that the description is sufficiently certain by reason of sec. 1047, Stats., which is as follows:

"In all assessments and tax rolls, and in all advertisements, certificates, papers, conveyances or proceedings for the assessment and collection of taxes, and proceedings founded thereon, as well heretofore as hereafter, any descriptions of land which shall indicate the land intended with ordinary and reasonable certainty and which would be sufficient between grantor and grantee in an ordinary conveyance shall be sufficient; nor shall any description of land according to the United States survey be deemed insufficient by reason of the omission of the word quarter or the figures or signs representing it in connection with the words or initial letters indicating any legal subdivision of lands according to government survey. Where a more complete description may not be practicable and the deed describing any piece of real property is recorded in the office of the register of deeds for the county, a description stating the volume and page where re-

corded, and the section, village, or, if within a city, the ward, where the property is situated, shall be sufficient."

We think it permissible to refer to the prior tax proceedings upon which the sale of the land is based for the purpose of ascertaining which particular undivided one-half was sold. From such examination it appears that the tax was paid upon the undivided one-half owned by the plaintiff, therefore the undivided one-half owned by the *Wisconsin Farm Land Company* must necessarily have been the one sold.

The case of *Hoyt v. Lightbody,* 98 Minn. 189, 108 N. W. 843, is cited to our attention. It does not appear that in Minnesota there is a statute corresponding to sec. 1047. Whether or not there is such a statute, we are not inclined to adopt a construction of the tax laws contrary to the almost universal interpretation thereof by the profession for many years and one which might unsettle the title to many hundreds of thousands of acres of land in northern Wisconsin.

Respondents also claim that a tenant in common cannot acquire the interest of his cotenant by taking a tax deed thereon, notwithstanding title is derived through different instruments and the land is vacant. It clearly appears in this case that the tenants in common derived their interests under separate instruments; that the lands are unoccupied; and that there is no relationship between the owners other than that of mere tenancy in common. Under such circumstances one tenant in common may acquire the title of his cotenant by tax deed. *Allen v. Allen,* 114 Wis. 615, 91 N. W. 218.

By the Court.—Judgment reversed, with directions to enter judgment for plaintiff quieting his title to the lands in question.

KRAUSE, Respondent, vs. ARNOLD, Administrator, Appellant.

January 19—February 13, 1917.

Bills and notes: Certificate of deposit: Ownership: Evidence.

A finding by the trial court to the effect that a certificate of deposit had been indorsed by the depositor (since deceased) and turned over to plaintiff as compensation for her services, is *held* not to be contrary to a clear preponderance of the evidence.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Affirmed.*

Action to recover on a certificate of deposit for $1,500, issued to W. F. Bailey by the Lumbermen's National Bank of Chippewa Falls, Wisconsin.

Mr. Bailey died before the action was commenced and defendant, *Arnold,* was duly appointed administrator of his estate and was interpleaded as a defendant. The money was paid into court and the issue as to whether plaintiff or the administrator was entitled thereto was litigated between them, resulting in findings that plaintiff was the owner of the certificate and entitled to recover. Judgment was entered accordingly and the administrator appealed.

Fred Arnold of Eau Claire, for the appellant.

For the respondent there was a brief by *Sturdevant & Farr* of Eau Claire, and oral argument by *L. M. Sturdevant.*

MARSHALL, J. The sole question in this case was one of fact. That was whether Mr. Bailey indorsed and turned the certificate of deposit over to plaintiff for services. There was evidence to the effect that she was his confidential clerk for some sixteen years, and as such largely had charge of his papers, assisted him in much literary work as a typewriter and stenographer, and otherwise, and did much to take care of him in sickness, which services, in the whole, were not performed gratuitously and were reasonably worth $700 per year. There was further evidence to the effect that the sig-

nature on the back of the certificate was that of Mr. Bailey; that he indorsed his name thereon several months before his death and delivered it to plaintiff on services; that shortly before his death he declared that he indorsed the certificate and that it was her property. There was no direct evidence to the contrary of this and no conclusive controverting circumstances. It is not thought best to refer to the evidence in detail. It has been carefully examined resulting in a conviction that no sound basis can be found in the record for holding that the circuit judge's conclusions are contrary to the clear preponderance of the evidence. The judgment must therefore be affirmed.

By the Court.—Judgment is affirmed.

GREAT NORTHERN RAILWAY COMPANY, Appellant, vs. KING and another, Respondents.

SAME, Respondent, vs. KING, Appellant, and another, Respondent.

January 19—February 13, 1917.

Workmen's compensation: Election not to accept law: Time for filing: Extension: Withdrawal from operation of the act: When employee engaged in interstate commerce: Award conclusive upon party not bringing action to review it.

1. The legislature having, in sub. 2, sec. 2394—5, Stats., fixed the time before which notice of an election by an employer not to accept the provisions of the Workmen's Compensation Act must be filed, the courts are powerless to extend the time.
2. A notice of such an election which was dated August 30th, mailed September 2d, and received by the industrial commission September 3, 1913, was not filed prior to September 1, 1913, within the meaning of sub. 2, sec. 2394—5, Stats., and hence was not effective.
3. Such ineffective notice of election cannot be construed as a withdrawal under the provision of said section which allows an employer to withdraw himself from the operation of the law at the end of the year.

4. To establish that a railway employee was, at the time of injury, "employed in interstate commerce," it must appear that he was at that time engaged in interstate transportation or in work so closely related to it as to be practically a part of it.
5. Where a railway company transacted both interstate and intrastate business, although the latter was trifling in amount, a janitor in its general office in this state who was injured while breaking up coal for the furnace was not at the time engaged in interstate commerce.
6. So far as an award by the industrial commission under the Workmen's Compensation Act is against the contentions of either party it is conclusive and final unless that party brings his action to review it in that respect.

APPEALS from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The defendant *King* was awarded the sum of $562.20 by the *Industrial Commission* for a serious injury to his right eye by an accident occurring while employed by the plaintiff as janitor in its general office at Superior, Wisconsin. While he was breaking up coal for the furnace with an axe, a small splinter flew off and struck him in the eye. He claimed double the compensation actually awarded to him because (as the *Commission* found) there was practically a total loss of vision of the eye, but the *Commission* awarded him compensation on the basis of fifty per cent. diminished vision because of the admitted fact that the eye prior to the accident had only one half of ordinary vision owing to congenital causes. The plaintiff brought this action to set aside the award, and after trial judgment was entered confirming the award, from which judgment the railway company appeals. *King* brought no action to increase the award, but has appealed from the judgment in this action, and contends that the circuit court should have awarded him compensation for total loss of vision of the eye and that such relief may be given him in the present action.

The cause was submitted for the plaintiff on the brief of *J. A. Murphy* of Superior; for the defendant *King* on that of *Hanitch & Hartley* of Superior; and for the defendant

Industrial Commission of Wisconsin on that of the *Attorney General* and *Winfield W. Gilman,* assistant attorney general.

WINSLOW, C. J. The appellant railway company claims a reversal (1) because it was not under the Workmen's Compensation Law at the time of the injury, and (2) because the claimant was engaged in interstate commerce at the time and hence the Compensation Law does not apply under the terms of sub. (3), sec. 2394—8, Stats. These contentions will be briefly considered.

1. The Workmen's Compensation Law at the time of the accident provided in substance that on and after September 1, 1913, every employer of four or more employees should be deemed to have elected to accept the law unless prior to that date he had filed a notice of his election not to accept the law.

The claim is made in the present case that such a notice was filed, but the evidence is undisputed to the effect that the only notice filed was a notice dated August 30th, mailed at Superior September 2d, and received by the *Commission* September 3, 1913. By no stretch of the imagination can this be called a notice filed "prior" to September 1st. Statutes allowing amendment in court proceedings have not the remotest application. The legislature has definitely fixed the time when the act in question must be done and the court is powerless to extend it.

It is argued that if the notice was not effective as an election it should be construed as a withdrawal under the provisions of the Compensation Law which allow an employer to withdraw himself from the operation of the law at the end of the year. The notice says simply that the railway company "elects not to accept the provisions" of the law. *Non constat* that it wished to withdraw when it ascertained that its notice of nonacceptance was filed too late. To construe it as a withdrawal would be doing violence to plain language. It says no such thing.

2. Many cases, state and federal, are cited to us upon the

question whether *King* was engaged in interstate commerce at the time of the accident. To review them would be of no use and would but add confusion to a subject already sufficiently confused. The supreme court of the United States is, of course, the final authority on the subject, and the two most recent cases on the subject which are cited to us are *Shanks v. D., L. & W. R. Co.* 239 U. S. 556, 36 Sup. Ct. 188, and *Chicago, B. & Q. R. Co. v. Harrington,* 241 U. S. 177, 36 Sup. Ct. 117.

In the first case named the injured employee was injured while altering the location of an overhead counter-shaft in the repair shop of the company where locomotives of the company engaged in both interstate and intrastate transportation were repaired. In the second case named the employee was injured in removing coal from storage tracks to coal chutes where it was to be put into locomotives for use in hauling interstate trains.

In both cases the court said that the employee at the time of the injury must be "employed in interstate commerce" and that the true test of such employment is, "Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" In each case it was held that the employee was not so engaged. Applying the test laid down in those cases to the present case it seems quite certain to us that *King* does not answer its calls. It is true that the business of the *Great Northern Railway Company* is almost entirely interstate business and that its state business is absolutely trifling in comparison, nevertheless it transacts both interstate and intrastate business; and where this is the case we see no logical line that can be drawn based on the relative amount of the intrastate business which is done.

We are well satisfied that *King's* appeal is ineffective, even if we were of opinion that the *Commission* and the trial court erred in not awarding compensation on the basis of a

total loss of vision. We are not to be understood as intimating any such opinion.

The Compensation Law seems to us to contemplate that so far as an award is against the contentions of either party it is conclusive and final unless *that party* appeals. Sec. 2394—19, Stats., says that the findings of fact, in the absence of fraud, shall be conclusive, and the award subject to review only when the aggrieved party within twenty days commences an action against the commission and the adverse party to review the award, in which action the complaint shall state the grounds on which the review is sought, and the commission shall serve its answer within twenty days after service of the complaint. No mention is made in the statute of any such thing as a counterclaim or cross-complaint, and we think it clear that the intent of the statute was to limit the contest in the circuit court to the claims made by the aggrieved party who has commenced his action. Of course, if both parties feel dissatisfied and commence separate actions the two actions should doubtless be consolidated and tried together.

A somewhat similar question was presented in the case of *Appleton W. W. Co. v. Railroad Comm.* 154 Wis. 121, 142 N. W. 476, with regard to actions brought to review the orders of the *Railroad Commission,* and it was there held that there was no trial *de novo* of the whole matter, but only examination and decision of the specific claims of error made by the plaintiff. The statutes are quite different, it is true, but the cases seem analogous.

By the Court.—Judgment affirmed on both appeals without costs.

STATE EX REL. JOHNSON and others vs. COUNTY BOARDS OF SUPERVISORS OF LA CROSSE AND TREMPEALEAU COUNTIES.

February 13, 1917.

Supreme court: Original jurisdiction, when exercised: Sending case to circuit court for trial: Counties: Repair of bridge over boundary stream.

1. The original jurisdiction of the supreme court will not be exercised in an action affecting only local interests, where there is adequate remedy in the lower courts.
2. So *held* as to an action by *mandamus* to compel the county boards of two counties to keep in repair, as required by ch. 565, Laws 1915, a bridge across a stream forming the boundary between said counties, the public interests involved being local only and the remedy in the circuit court entirely adequate.
3. Pursuant to sec. 2836*a*, Stats., such action, commenced in the supreme court, is certified to the circuit court for one of the counties interested, to be tried in that court as if originally brought there—said sec. 2836*a* being construed as applicable to the supreme court as well as to the circuit courts.

MANDAMUS to the county boards of La Crosse and Trempealeau counties. *Action certified to the circuit court for Trempealeau county for trial.*

On February 13, 1917, the respondents moved to quash the writ. The motion was argued for the respondents by *Otto M. Schlabach* of La Crosse, district attorney of La Crosse county, and *Elmer E. Barlow* of Whitehall, district attorney of Trempealeau county, and for the relators by *R. S. Cowie* of Whitehall.

The court ordered that the action be certified at once to the circuit court for Trempealeau county, there to be heard and tried as if originally brought in that court. No costs were awarded against either party.

The following opinion was filed February 17, 1917:

PER CURIAM. Upon the petition of the relators (part of whom are residents of La Crosse county and part of Trem-

pealeau county) an alternative writ of *mandamus* was issued out of this court directed to the county boards of said counties commanding them to repair at joint expense a certain bridge and its approaches over Black river or show cause to the contrary. The river at this place forms the boundary between the two counties. The bridge forms a part of the highway connecting the two counties, and is the same highway which was the subject of the action of *State ex rel. Johnson v. Hintgen,* 157 Wis. 355, 147 N. W. 363. It appears by the petition that since the decision in that case ch. 565, Laws 1915, has been passed, requiring that all bridges and their approaches crossing streams which form the boundary between two counties be kept in repair at the joint expense of the two counties. By the present action the relators are attempting to enforce the provisions of the last named law. Upon the return day of the writ a motion to quash was made by the respondents, and the court, being of opinion that the writ had been improvidently granted, ordered that the action be certified to the circuit court for Trempealeau county to be tried in that court as if originally brought there. The case undoubtedly involves a question *publici juris,* but as it is only local in its effect and in the public interests involved and as the remedy in the circuit court is entirely adequate, it does not answer the calls which this court has laid down for the exercise of the original jurisdiction of this court. *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164.

It is not that this court is actually without jurisdiction, but that, within what are now well established rules governing the use of the original jurisdiction, it will not be exercised in an action affecting only local interests where there is adequate remedy in the lower courts.

But it is happily no longer necessary that an action should be dismissed under such circumstances. We construe sec. 2836*a,* Stats. 1915 (ch. 219, Laws 1915), as applicable to this court as well as to the circuit courts. Under its sensible

and beneficent provisions a case may under such circumstances be at once certified to the proper circuit court for trial as if originally commenced there, and this is the course which has been taken.

MORRISON, Appellant, vs. HENKE and others, Respondents.

November 14, 1916—March 13, 1917.

Hospitals: Liability for negligence of nurses: Liability of surgeons.

1. A finding that surgeons who operated upon plaintiff at a hospital were negligent in permitting certain nurses to attend him after the operation, is *held* to have been properly set aside by the trial court, there being no evidence to show that, even if the nurses were incompetent, the surgeons—who were not agents or servants of the hospital—knew or were chargeable with knowledge of such incompetency.
2. Charitable hospitals are not liable to their patients for negligence of employees selected with due care. Such hospitals perform a *quasi*-public function in ministering to the poor and sick without any pecuniary profit to themselves, and the doctrine of *respondeat superior* should not be applied to them in favor of those receiving their charitable services.
3. The exemption of such hospitals from liability applies to pay as well as to free patients.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action to recover damages for alleged negligent treatment of plaintiff following an operation for appendicitis while a patient at the defendant hospital. The defendants *Henke* and *Mast* were surgeons of La Crosse who performed the operation on plaintiff while at the hospital. They were not agents or servants of the hospital, but came in, as other doctors or surgeons did, to treat patients desiring their services. The case was tried to a jury and they found: (1) that the sores on plaintiff's leg were caused by a burn from a hot-

water bottle placed in his bed at the hospital; (2) that the nurses placed in charge of plaintiff were incompetent; (3) that the defendants *Henke* and *Mast* were wanting in the exercise of ordinary care in permitting such nurses to attend the plaintiff after the operation; (4) that such want of ordinary care was the proximate cause of plaintiff's injury; (5) that the nurses who had charge of plaintiff were wanting in the exercise of ordinary care in their care and attendance upon him; (6) that such want of ordinary care was a proximate cause of plaintiff's injury; and (7) damages in the sum of $700.

The court set aside the third finding on the ground that there was no evidence in support thereof, found *Henke* and *Mast* free from negligence, and dismissed the case as to them. He also dismissed the action against the *La Crosse Hospital Association* on the ground that, being a charitable institution, the doctrine of *respondeat superior* did not apply to it.

From a judgment entered accordingly the plaintiff appealed.

For the appellant there was a brief by *Baldwin & Bosshard* of La Crosse, and oral argument by *C. L. Baldwin.*

For the respondents *Henke* and *Mast* there was a brief by *Lees & Bunge* and *Wolfe, Wolfe & Reid,* all of La Crosse, and oral argument by *George W. Bunge.*

For the respondent *La Crosse Hospital Association* there was a brief by *McConnell & Schweizer* of La Crosse, and oral argument by *Charles H. Schweizer.*

The following opinion was filed December 5, 1916:

VINJE, J. We have examined the evidence relative to the alleged negligence of *Henke* and *Mast* and are satisfied that the court properly set aside the finding that they were wanting in the exercise of ordinary care in permitting the nurses to attend plaintiff after the operation. There is no evidence to show that if the nurses were incompetent—a fact by no

means clearly established—the doctors knew or were chargeable with knowledge of such incompetency. They were not hired by the doctors but by the defendant hospital, and no fact is shown coming to the knowledge of the doctors sufficient to put them upon inquiry as to the nurses' competency. In the absence of such fact they had a right to assume they were competent.

The court also properly dismissed the action as to the defendant *La Crosse Hospital Association.* The evidence shows that it is an eleemosynary institution paying no dividends and is largely supported by charitable donations; that the fees charged from patients able to pay do not support it; and that the weekly charge made to the plaintiff was not enough to cover the cost of the services rendered to him.

The authorities in this country almost uniformly hold that in the absence of any negligence in their selection charitable hospitals are not liable to their patients for the torts of their employees. *McDonald v. Massachusetts Gen. Hosp.* 120 Mass. 432; *Powers v. Massachusetts H. Hosp.* 109 Fed. 294, 65 L. R. A. 372; *Thornton v. Franklin Square House,* 200 Mass. 465, 86 N. E. 909, 22 L. R. A. N. S. 486; *Downs v. Harper Hosp.* 101 Mich. 555, 60 N. W. 42, 25 L. R. A. 602; *Pepke v. Grace Hosp.* 130 Mich. 493, 90 N. W. 278; *Farrigan v. Pevear,* 193 Mass. 147, 78 N. E. 855, 7 L. R. A. N. S. 481; *Hearns v. Waterbury Hosp.* 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; *Jensen v. Maine E. & E. Infirmary,* 107 Me. 408, 78 Atl. 898, 33 L. R. A. N. S. 141; *Taylor v. Protestant H. Asso.* 85 Ohio St. 90, 96 N. E. 1089, 39 L. R. A. N. S. 427; *Adams v. University Hosp.* 122 Mo. App. 675, 99 S. W. 453; *Gable v. Sisters of St. Francis,* 227 Pa. St. 254, 75 Atl. 1087; *Schloendorff v. Society of N. Y. Hosp.* 211 N. Y. 125, 105 N. E. 92, 52 L. R. A. N. S. 505; *Nicholson v. Atchison, T. & S. F. H. Asso.* 97 Kan. 480, 155 Pac. 920, L. R. A. 1916D, 1029; *Duncan v. Nebraska S. & B. Asso.* 92 Neb. 162, 137 N. W. 1120, 41 L. R. A. N. S. 973;

Wharton v. Warner, 75 Wash. 470, 135 Pac. 235; *St. Paul's Sanitarium v. Williamson* (Tex. Civ. App.) 164 S. W. 36; *Perry v. House of Refuge,* 63 Md. 20; 2 Cooley, Torts (3d ed.) 1011–1013; 1 Jaggard, Torts, 184; 2 Dillon, Mun. Corp. (4th ed.) § 974; 6 Cyc. 975; 5 Ruling Case Law, 374 *et seq.;* 13 Ruling Case Law, 944 *et seq.* See, also, notes in 23 L. R. A. 200; 2 L. R. A. N. S. 556; 7 L. R. A. N. S. 481; 32 L. R. A. N. S. 62; 52 L. R. A. N. S. 505, and L. R. A. 1916D, 1029.

In *Alston v. Walden Academy,* 118 Tenn. 24, 102 S. W. 351, 11 L. R. A. N. S. 1179, and in *Parks v. Northwestern Univ.* 218 Ill. 381, 75 N. E. 991, 2 L. R. A. N. S. 556, the same immunity was applied to schools. In *Fire Ins. Patrol v. Boyd,* 120 Pa. St. 624, 650, 15 Atl. 553, 1 L. R. A. 417, immunity was held to exist as against a stranger to the patrol who was injured by its servants. But in *McInerny v. St. Luke's H. Asso.* 122 Minn. 10, 141 N. W. 837, and *Hewett v. Woman's H. A. Asso.* 73 N. H. 556, 64 Atl. 190, 7 L. R. A. N. S. 496, defendants were held liable to their servants for failure to perform nondelegable duties which as masters they owed them. Liability has also been enforced in favor of strangers or employees. *Basabo v. Salvation Army,* 35 R. I. 22, 85 Atl. 120, 42 L. R. A. N. S. 1144; *Hordern v. Salvation Army,* 199 N. Y. 233, 92 N. E. 626, 32 L. R. A. N. S. 62, and note; *Bruce v. Central M. E. Church,* 147 Mich. 230, 110 N. W. 951, 10 L. R. A. N. S. 74 and note.

Upon the precise question of the liability of charitable hospitals to their patients for the negligence of employees selected with due care, we have been able to find but two cases in this country that hold them liable. These are *Glavin v. Rhode Island Hosp.* 12 R. I. 411, and *Tucker v. Mobile I. Asso.* 191 Ala. 572, 68 South. 4, L. R. A. 1915D, 1167. In Rhode Island the rule of the *Glavin Case* was changed by sec. 38, ch. 177, Gen. Laws 1896, and in the Alabama case there was a strong dissenting opinion. The latter

case is valuable for its able discussions of the two opposing views. New Brunswick, in *Donaldson v. Comm'rs,* 30 N. B. 279, by a divided court, has also held them liable.

While our courts disclose great unanimity in declaring charitable hospitals immune against claims of their patients based upon the negligence of their servants, they are by no means agreed as to the grounds of immunity. Some place it upon the ground of public policy; others upon the ground that since the funds of the institutions are impressed with a trust for charitable purposes they cannot be diverted to other uses; and still others upon the ground of an implied waiver on the part of voluntary recipients of the charity of any claim for damages. Without discussing the relative merits of these different grounds, we prefer to rest our decision upon the principle that since these charitable hospitals perform a *quasi*-public function in ministering to the poor and sick without any pecuniary profit to themselves, the doctrine of *respondeat superior* should not be applied to them in favor of those receiving their charitable services. As stated by BEST, C. J., in *Hall v. Smith,* 2 Bing. 156, "The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it." Since the hospital derives no profit from its work and since it is founded for the sole purpose of conserving the health and life of all who may need its aid, and since it ministers to those who cannot pay as well as those who can, thus acting as a good Samaritan, justice and sound public policy alike dictate that it should be exempt from the liability attaching to masters whose only aim is to engage in enterprises of profit or of self-interest. The patient who accepts the services of such an institution, if injured therein by the negligence of an employee, must be content to look for redress to such employee alone. The principle invoked is analogous to that which exempts municipalities from the rule

of *respondeat superior* in the discharge of their governmental functions.

All the cases holding charitable hospitals immune that have spoken upon the subject agree that the exemption from liability applies to pay as well as to free patients.

Appellant claims he should have a new trial upon the question of whether or not the defendant hospital exercised due care in the selection of the nurses. We deem the evidence would not warrant us in sending the case back for a trial upon that issue.

By the Court.—Judgment affirmed.

The appellant moved for a rehearing.

In support of the motion there was a brief by *Baldwin & Bosshard* of La Crosse, and separate briefs signed respectively by *Christian Doerfler* of Milwaukee and *Elmore T. Elver* of Madison as *amici curiæ.*

In opposition to the motion there was a brief for the respondent *La Crosse Hospital Association* by *McConnell & Schweizer* of La Crosse.

The motion was denied, with $25 costs, on March 13, 1917.

DANIELSON and others, Appellants, vs. DANIELSON and others, Respondents.

January 17—March 13, 1917.

Deeds: Conditions subsequent: Support of grantors: Breach of condition: Cancellation: Other equitable remedies: Foreclosure of mortgage.

1. A conveyance made by aged people in consideration of support and care may be deemed to be a conveyance upon condition subsequent, and upon proof of a substantial failure to perform will be set aside in a proper case; but that remedy is not exclusive, and other and different relief may be granted when the facts require it in order to do equity between all parties.

2. Whether the parties can be placed *in statu quo* is always an important consideration in such cases.
3. Two tracts of land, one owned by plaintiff and one by his wife, were conveyed to their son in consideration of his agreement to support and care for them and the survivor of them during life; and a mortgage was given back to secure performance of the agreement. The son performed the agreement for about eight years and until his death, and thereafter his administrator offered or made some effort to perform, but other children of the grantors were compelled to help support them. The parents continued to live upon the premises until the death of the wife, and plaintiff remained thereon afterwards. No claim for a rescission was made by the wife nor by plaintiff until this action was commenced. Upon evidence of the above and other facts it is *held* that cancellation of the deed and restoration of title would be inequitable, and that a foreclosure of the mortgage was properly ordered, with provision for a sale unless certain payments for the support of the plaintiff be made by the heirs or administrator of the son, and a further provision that plaintiff have the use of the premises during his life.

APPEAL from a judgment of the circuit court for Juneau county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

This action was brought to cancel a deed, contract, and mortgage on the ground of alleged breach of condition subsequent to support the plaintiff *Ingimond Danielson* and his wife, and to quiet title in the grantors and their heirs.

There is nothing in the deed, contract, or mortgage providing for revesting of title or re-entry.

The court below found that the plaintiff *Ingimond Danielson* was the owner of forty acres, and Dora Danielson, his wife, in her lifetime was the owner of eighty acres of the real estate in question; that Dora died intestate June 8, 1914, leaving her surviving her husband, *Ingimond,* and children *Bertha Payzant, David Danielson,* and *Ruby V.* and *Carmen Lill,* children of her deceased daughter, Ellen Lill, and the defendants, *Irl* and *Irene Danielson,* children of a deceased son, Nicholas Danielson, her sole and only heirs at law; that on March 17, 1903, the plaintiff *Ingimond* and Dora were in poor health and unable to superin-

tend their farm and contracted with their son Nicholas that he should have a deed of the farm in consideration that he should support and maintain them at their home, give them care, medicine, medical aid, nursing, food, and shelter for the term of their natural lives, and the survivor of them; that a mortgage was given in the sum of $1,500 to secure said agreement; that a deed was executed to Nicholas of the land in question in accordance with the terms of the contract for support; that said deed and mortgage were recorded March 23, 1903; that the contract between Nicholas, *Ingimond,* and Dora provided that said Nicholas should not sell or dispose of the premises during the term of the contract; that said deed, contract, and mortgage were part and parcel of the same contract, executed and delivered at the same time, and that Nicholas paid no other consideration except that named in the contract; that said Nicholas entered into possession of the premises and occupied the same with *Ingimond* and Dora from the 17th day of March, 1903, until the 26th day of June, 1911, at which last named date Nicholas committed suicide and left two children, *Irl,* fourteen years of age, and *Irene,* seventeen years of age, his sole and only heirs at law; that after the death of Nicholas, *Ingimond* and Dora continued to live on the premises, cultivated the same, paid the taxes, and had actual and exclusive possession of the same until the 8th day of June, 1914; that on said latter date Dora died intestate and the premises have ever since been in the actual possession of plaintiff *Ingimond Danielson;* that defendant *H. J. Mortensen* was appointed administrator of the estate of Nicholas Danielson on September 13, 1911, and qualified as such; that since June 26, 1911, plaintiff *Ingimond* and Dora have been compelled to support and care for themselves and have been obliged to call upon plaintiffs *Bertha Payzant* and *David Danielson* to furnish money to provide for and maintain themselves, and that said *Bertha* and *David* have furnished their parents since

June 26, 1911, the sum of $300 or more; that the value of the eighty acres owned by Dora, included in the deed, was $2,300, and the value of the forty acres owned by *Ingimond,* included in the deed, was $700; that from March 17, 1903, to June 26, 1911, Nicholas had not increased the value of the premises and that the heirs are not entitled to any credits as a condition of rescission; that there is not sufficient evidence to prove that *Ingimond* has appropriated any of Nicholas Danielson's personal property since his death; that *Irl Danielson* and *Irene Danielson,* heirs of Nicholas, are not entitled to any credits therefor; and that there was a breach of Nicholas Danielson's contract from and after his death on the 26th day of June, 1911.

The court concluded that the plaintiff *Ingimond* was entitled to foreclosure of the mortgage and to enforce the terms of the contract and mortgage for support and maintenance; that it is not practicable to protect plaintiff's rights by rescinding the conveyance to Nicholas; that plaintiff is entitled to a judgment of foreclosure of the mortgage and to recover as follows: the heirs of Nicholas or the legal representative of his estate shall pay said plaintiff within thirty days after entry of judgment the sum of $100 for his support and maintenance; the heirs or legal representative shall pay plaintiff $100 annually for support and maintenance from and after the 1st day of January, 1916, which payment shall be in instalments of $25 every three months, the first to be made on April 1, 1916, which payment shall be made as a provision for the care, medicine, medical aid, nursing, food, clothing, and shelter required by the contract; that the plaintiff *Ingimond Danielson* shall recover solicitor's fees in the sum of $50 and taxable costs in foreclosure suit, which shall be paid plaintiff's attorney within one year from entry of judgment; that the judgment shall provide that application may be made from time to time to compel the payment of larger amounts for support of plaintiff, if it shall be shown

that plaintiff is in need thereof; that in addition to the provisions hereinabove made plaintiff may remain on the farm and have the use of the same as long as he lives, and if he does not wish to live upon the premises the defendants *Irl* and *Irene,* or the administrator of the estate of Nicholas, may rent the place, or use the same as they think best; that the judgment requiring the heirs or legal representative to make payment shall create no personal liability against them; that unless said sums be paid at the times and in the manner specified the plaintiff may apply to the court for an order directing that the premises be sold at public auction in the manner provided by law for the sale of real estate on foreclosure, and that the money derived from such sale be paid into court for the purpose of making the payments hereinabove provided, and that said money shall be subject to the further order of the court.

Judgment was entered accordingly, from which this appeal was taken.

For the appellants there was a brief by *J. A. McFarlane* of Mauston and *Grotophorst & Thomas* of Baraboo, and oral argument by *H. H. Thomas.*

H. J. Mortensen of New Lisbon, for the respondents.

KERWIN, J. There is practically no dispute upon the facts. The errors assigned are upon refusal to find conclusions of law proposed by appellants and in the conclusions of law made upon the facts found. The contention relates to the remedy.

It is apparent from the record that the court below was in doubt as to what relief should be granted upon the established facts, but finally, after much consideration, concluded to order foreclosure of the mortgage in lieu of ordering judgment canceling the deed, contract, and mortgage and restoring the title to the property to the original grantors and their heirs.

The court below obviously determined that the judgment of foreclosure ordered was a fair, equitable judgment, and the one most advantageous to plaintiff *Ingimond Danielson,* and just and equitable to all parties interested, while cancellation of the written instruments referred to and restoration of title would not be.

We cannot say upon the facts found that this conclusion is wrong, and the only question is whether the remedy adopted by the court was proper under the established facts.

The contention of appellants is that rescission was the only proper remedy and that the court below was in error in ordering foreclosure of the mortgage, and they rely mainly upon *Glocke v. Glocke,* 113 Wis. 303, 89 N. W. 118; *Wanner v. Wanner,* 115 Wis. 196, 91 N. W. 671; *Lowrey v. Finkleston,* 149 Wis. 222, 134 N. W. 344; *Bogie v. Bogie,* 41 Wis. 209; and *Young v. Young,* 157 Wis. 424, 147 N. W. 361.

It is settled law in this court that conveyances made by aged people in consideration of support and care may be deemed to be conveyances upon condition subsequent and will, upon facts similar to those in the foregoing cases, be set aside by a court of equity upon proof of substantial failure to perform.

It does not follow, however, that other adequate relief cannot be granted when the facts in the case require it in order to do equity between all parties. *Morgan v. Loomis,* 78 Wis. 594, 48 N. W. 109; *Donnelly v. Eastes,* 94 Wis. 390, 69 N. W. 157; *Glocke v. Glocke,* 113 Wis. 303, 89 N. W. 118; *Wanner v. Wanner,* 115 Wis. 196, 91 N. W. 671; *Maginnis v. Knickerbocker I. Co.* 112 Wis. 385, 88 N. W. 300; *Lowrey v. Finkleston,* 149 Wis. 222, 134 N. W. 344; *Mootz v. Petraschefski,* 137 Wis. 315, 118 N. W. 865; *Western L. & C. Co. v. Copper River L. Co.* 138 Wis. 404, 120 N. W. 277; *Burgson v. Jacobson,* 124 Wis. 295, 102 N. W. 563; *Keister v. Cubine,* 101 Va. 768, 45 S. E. 285; 13 Cyc. 701; *Marvel v. Phillips,* 162 Mass. 399, 38 N. E. 1117, 26 L. R. A. 416.

While the cases in Wisconsin relied upon by appellants and others hold that cancellation will be adjudged in a proper case the remedy is not held to be exclusive. In the *Glocke Case* this court, in speaking of the remedy for condition subsequent broken, said: "For a breach thereof the title thereto will, at the election of the grantor, no sufficient equitable considerations to the contrary standing in the way, revert without judicial aid, the same as in any other case of breach of condition subsequent." 113 Wis. 303, 321, 89 N. W. 118.

In *Lowrey v. Finkleston* it is said: "The agreement will be treated in equity as a condition subsequent, and, if substantially broken through failure of the grantor to perform, the conveyance will be set aside." 149 Wis. 222, 230, 134 N. W. 344.

In *Brenger v. Brenger,* 142 Wis. 26, 39, 125 N. W. 109, the following language is used: "In case of a conveyance by an old person of his property to another to secure from such other support and attention during the rest of his days, and the consideration wholly failing, without reasonable excuse on the part of the grantee, a court of equity will, by rules for construction, hold the conveyance to have been made upon condition subsequent and deal with the situation accordingly."

In *Burgson v. Jacobson,* 124 Wis. 295, 102 N. W. 563, it is held that a condition subsequent, when relied upon to work a forfeiture, must be created by express terms or clear implication, citing 2 Washb. Real Prop. (4th ed.) 7; and the court says: "In this class of cases the obligation is held to be a condition subsequent, because from the nature of the contract the parties must have intended to create a condition subsequent, since otherwise upon a breach the purpose of the agreement would be defeated and the grantor have no adequate remedy." See 124 Wis. 299, 300.

Young v. Young, 157 Wis. 424, 147 N. W. 361, and *Mootz v. Petraschefski,* 137 Wis. 315, 118 N. W. 865, hold that

cancellation will be ordered in a proper case, but do not hold or intimate that it is the only remedy, or that equity will always declare rescission and restore the title to the grantor.

In *Maginnis v. Knickerbocker I. Co.* 112 Wis. 385, 88 N. W. 300, there was an express condition and provision that if the condition should at any time be broken there should be a reverter to the grantor, his heirs and assigns. The condition subsequent was in fact broken and there was a re-entry. In this case the equitable doctrine is recognized and declared to the effect that, although the condition subsequent may be broken and a re-entry occur, still the title may be subject to control in equity where justice and equity require it in order to adequately measure the loss.

In *Bogie v. Bogie,* 41 Wis. 209, the provision respecting duty of grantee rested in covenant and not in condition, yet the court rescinded the sale in order to do equity.

While we do not think it necessary to cite foreign cases we call attention to *Keister v. Cubine,* 101 Va. 768, 45 S. E. 285, as squarely in point.

The plaintiff *Ingimond Danielson* at the time of commencement of this action was about ninety-one years of age. The agreement to support and care for the parents by Nicholas was kept up to the time Nicholas committed suicide. This unfortunate event prevented him from further performance of the contract, and it seems the administrator of Nicholas offered or made some effort to further perform the contract between Nicholas, *Ingimond,* and Dora Danielson. Nicholas performed the contract for more than eight years before his death, June 26, 1911, and *Ingimond* and Dora from June 26, 1911, to June 8, 1914, continued to live on the farm and enjoy the rents and profits thereof and had the benefit of the contract, at least in part, during that time. Plaintiff *Ingimond* made no claim for rescission until this suit was commenced and Dora never made claim for rescission. After the death of Nicholas, plaintiffs *Bertha Pay-*

zant and *David Danielson* helped to furnish support for their parents to the extent of about $300. Whether the parties can be placed *in statu quo* is always an important consideration in cases like the one at bar.

It is clear from the record and undisputed facts that rescission of the deed and restoration of title would be inequitable, and that foreclosure of the mortgage as ordered by the court below fully protects the plaintiff *Ingimond Danielson* and all parties interested and is just and equitable.

It follows that the judgment of the court below is right and must be affirmed.

By the Court.—The judgment is affirmed.

STATE EX REL. CARPENTER and another vs. BACKUS, Acting Judge.

January 19—March 13, 1917.

Racine municipal court: Change of venue in criminal action: Power of circuit court to grant second change to another county.

1. The right to a change of venue exists in this state only by virtue of the statute, and such change can be had only upon the terms prescribed.
2. The first sentence in sec. 10 of the act creating the municipal court of Racine county (ch. 72, Laws 1897) is applicable to criminal as well as to civil actions, and the exception therein stated operates to prevent the said court from granting a change of venue in a criminal case to any court of another county; but after the venue in a criminal action has been changed, on the ground of prejudice of the judge, from said municipal court to the circuit court for Racine county, the circuit court may grant a change to another county, under sec. 4679, Stats., upon a satisfactory showing that an impartial trial cannot be had in Racine county. ESCHWEILER and KERWIN, JJ., dissent.
3. Where, in such a case, a change of venue was asked on the ground last mentioned, it was not error for the circuit court to deny it without prejudice to a renewal of the motion "if it

shall appear on the *voir dire* that the defendants . . . cannot have a fair and impartial trial in Racine county." Such an order, not being a final determination of the rights of defendants, does not show an abuse of the discretion vested in the court by sec. 4679, Stats.

THIS IS an original proceeding brought in this court in the form of a *mandamus* and *certiorari*. An alternative writ of *mandamus* and a writ of *certiorari* auxiliary thereto are addressed and directed to Honorable AUGUST C. BACKUS, acting as judge of the circuit court for Racine county, commanding him to vacate and set aside a certain order made in his court on November 25, 1916, dismissing the petition of the relators and denying them a change of venue because of the prejudice of the people of Racine county, or show cause to the contrary before this court. The respondent moved to quash the alternative writ of *mandamus* upon the ground that neither the petition nor the writ shows that the relators are entitled to the relief prayed for.

On December 30, 1915, five indictments were returned by the grand jury against the relators. Four of them were directed against *Charles R. Carpenter* and the fifth was directed against both of the relators. They charged violations of the banking laws of the state of Wisconsin. These indictments were returned to the municipal court of Racine county, and on the 24th day of January, 1916, the relators each filed affidavits of prejudice against the judge of the municipal court. The cases were then transferred to the circuit court for Racine county. On April 10th the relators moved in circuit court for a change of venue on account of the prejudice of the people of Racine county. In support of the motion they filed affidavits to which were attached certain newspaper clippings. An order to show cause why the motion of relators should not be denied was issued out of circuit court on the 29th of April, 1916. This order to show cause was heard, and on the 13th of May Judge BACKUS, sitting for Circuit

Judge BELDEN, denied the motion for change of venue without prejudice to the defendants to renew the motion if it appear upon the *voir dire* that a fair trial cannot be had in Racine county. On November 18, 1916, relators filed another motion for change of venue based upon a verified petition and newspaper clippings showing that these cases had been made an issue between two candidates for the office of district attorney at the November election, 1916. This motion was heard and denied by Judge BACKUS on November 25, 1916. The recital of the order denying such motion states that the court is of the opinion that the defendants are not entitled to a second change of venue as a matter of statutory right. The order then declares:

"It is ordered that the motion of the defendants *Charles R. Carpenter* and *B. Hinrichs,* and each of them, made and entered upon the 18th day of November, 1916, for a change of the place of the trial of said actions, and each of them, be and the same hereby is each severally denied, without prejudice, however, to said defendants, and each of them, to renew said motions if it shall appear on the *voir dire* that the defendants, and each of them, cannot have a fair and impartial trial in Racine county, Wisconsin."

On November 29, 1916, writs of *mandamus* and *certiorari* were issued out of this court directed to Judge BACKUS to review his action in making and entering the order of November 25th. Respondent made due return to the writ of *certiorari* and moved to quash the alternative writ of *mandamus.*

For the relators there was a brief by *Quarles, Spence & Quarles* and *Guy D. Goff,* all of Milwaukee, attorneys for *Charles R. Carpenter,* and *Thompson & Harvey* of Racine and *W. H. Bennett* of Milwaukee, attorneys for *B. Hinrichs;* and the cause was argued orally by *Mr. Goff* and *Mr. W. C. Quarles.*

For the respondent there was a brief signed by *A. C. Umbreit* of Milwaukee and *William W. Storms* of Racine, attor-

neys for respondent and special counsel for the state, and by *Vilas H. Whaley,* district attorney for Racine county, and there was oral argument by *Mr. Storms* and *Mr. Umbreit.*

SIEBECKER, J. It seems clear that the right to a change of venue in this state is regulated by statute. This is declared by the decisions in this court on the subject. The effect of such decisions is stated in *French v. State,* 93 Wis. 325, 335, 67 N. W. 706:

"The right to a change of venue depends entirely upon the statute. It is not guaranteed by Const. art. I, sec. 7, or any other provision of the constitution. As the right exists only by virtue of the statute, a change of venue can be had only upon the terms the statute prescribes."

See *Baker v. State,* 56 Wis. 568, 14 N. W. 718; *Boldt v. State,* 72 Wis. 7, 38 N. W. 177; *Oborn v. State,* 143 Wis. 249, 126 N. W. 737.

The difficult question here presented involves the construction of the act establishing the municipal court of Racine county (sec. 10, ch. 72, Laws 1897). The original act provides:

"The provisions of law applicable to changes of venue in the circuit courts of this state, shall be applicable to said municipal court, except that when the venue of any action shall be so changed, it shall be changed to the circuit court of Racine county; and such change of venue shall not prevent the granting by said circuit court of a further change of venue as provided in section 2622, of the revised statutes of this state."

This act also provides that in case any "person charged upon indictment or information with a criminal offense shall have procured a change of venue to the circuit court of Racine county, . . ." the party shall be committed or held to bail in circuit court, and the papers and copy of record and proceedings, properly certified, shall be transmitted to the circuit court, "which shall then have full jurisdiction of

the action." Sec. 5, ch. 117, Laws 1899, re-enacted this section, but added after the above quoted words, "as provided in section 2622, of the revised statutes of this state," a provision to the effect that the right to change the venue under sec. 2621 by the municipal court shall be "direct to the proper county for the trial of the action." The language of the original act which is retained in the amended act expresses in explicit terms that the law as embodied in the statute applicable to circuit courts "shall be applicable to said municipal court, *except that when the venue of any action shall be so changed, it shall be changed to the circuit court of Racine county.*" The exception clearly is a limitation on the statutes as they applied to the circuit courts and operates to prevent the municipal court from granting a change of venue in a criminal case to any court of another county, and thus the provision of sec. 4679, Stats., applicable to circuit courts, providing that, when it appears that a fair and impartial trial cannot be had in the county, the circuit court wherein the action is pending may send it to some adjoining county where a fair and impartial trial can be had, is rendered inapplicable to the Racine county municipal court. It appears from the clause immediately following that the legislature intended to preserve this right under sec. 4679, Stats., by providing for the exercise of this right pursuant to the provisions of sec. 2622, Stats., namely, "and such change of venue shall not prevent the granting by said circuit court of a further change of venue as provided in section 2622, of the revised statutes of this state." This section is in the chapter of the statutes regulating "The Place of Trial of Civil Actions," but it specifies in sub. (2) thereof a ground for change of venue in cases "Where there is reason to believe that an impartial trial cannot be had therein" (the county), which is the same ground provided for in sec. 4679 in criminal cases. While this legislative method of providing for the exercise of this right in criminal cases pursuant to the provisions of sec.

2622 is not a common practice, yet we are confronted with the fact that it did so, and the courts cannot nullify its action on account of the circuitous way employed to accomplish this object. We are persuaded that the legislature intended to make the provisions of sec. 2622 applicable to all civil cases and to make the provision of sub. (2) thereof applicable to criminal cases that are embraced within sec. 4679 and transferred from the municipal to the circuit court for Racine county, and thus preserve to the accused the right of securing a change of venue on account of the prejudice of the people of the county. The provisions of the special act establishing this municipal court provide, in the last clause of the section here involved, that upon certification of a case to the circuit court such court "shall then have full jurisdiction of the action." This clearly shows that the circuit court is to exert its powers to protect the accused in all his rights granted by the law. It necessarily follows that it devolves on the circuit court for Racine county, upon application of defendants, to direct that they be tried in some adjoining county if it appears to the court's satisfaction that a fair and impartial trial cannot be had in Racine county.

This brings us to the question of the effect of the order of November 25, 1916. The court denied the applications of defendants for a change of the place of trial "without prejudice, however, to said defendants, and each of them, to renew said motions if it shall appear on the *voir dire* that the defendants, and each of them, cannot have a fair and impartial trial in Racine county, Wisconsin." It is apparent that the court has not refused and does not refuse to act in the proceeding in the future. While the court in terms denies the applications, it expressly does so with the intent to further consider the matter "on the *voir dire.*" The substance and effect of the ruling is that the court declared that it does not "appear to the satisfaction of the court, by affidavits, that a fair and impartial trial cannot be had" in Racine county, but that he will consider the matter further in the light of the

facts relevant to the question disclosed on the *voir dire,* if the defendants desire further action. It is therefore established that the court does not refuse to act in the matter if it can legally do so in the manner as indicated, on the *voir dire.* This procedure may be somewhat novel, but it is well adapted to aid the court in its inquest to determine whether or not a fair and impartial trial cannot be had in Racine county. Such inquiry upon the *voir dire* in no way adversely affects any of the defendants' rights and will be completed before they are put in jeopardy. It is considered that the court properly withheld its final determination of the question upon the grounds specified in the order. The statute, sec. 4679, provides that *the court must be satisfied that a fair and impartial trial cannot be had in Racine county in order to justify a change of the place of trial of a case.* This plainly indicates that a decision of this question by a trial court cannot be assailed as erroneous unless it is shown that the court abused the discretion vested in it by the statute. Since the court in the instant proceedings has not finally determined the rights of defendants in the matter, no question of an abuse of its discretion is before us. The record shows that the trial court has not finally denied the defendants the right to a change of the place of trial of the cases; that it expects to proceed with the inquest as to this matter upon the *voir dire.* Since the court has the power to entertain the applications under the statutes, as above shown, it follows that no case is presented which entitles relators to the writ of *mandamus* as prayed for, and judgment must be ordered quashing the writ, and that the record transmitted to this court in response to the writ of *certiorari* be returned to the circuit court for Racine county. All of the justices participated in this decision.

By the Court.—It is so ordered.

ESCHWEILER, J. I concur in the final result in this case and agree that the writ should be quashed upon either the

theory as to the laws affecting the municipal court as expressed by the majority opinion, or upon the theory stated herein, but I cannot agree with the construction given by the majority opinion on the right to a change of venue in the municipal court of Racine county.

The effect of the majority opinion on this point is that a defendant originally proceeded against in that court may have, as a matter of right, a change of venue to the circuit court for Racine county on account of the prejudice of the judge of such municipal court and thereafter a change of venue from the circuit court, as a matter of right, upon a satisfactory showing of the prejudice of the people. In other words, that such a defendant, unlike a defendant in any other court, may have, as a matter of right, two changes of venue in a criminal action. A defendant first proceeded against in a circuit court outside of Racine county is driven in the first instance to elect one of two grounds for a change of venue: (1) either for prejudice of the presiding judge, or (2) that of the people; and when he has so elected he can have, as a matter of right, no other or further change. A defendant proceeded against in the municipal court of Racine county may have, as a matter of right, a change for the prejudice of the judge of such court, and then again in the circuit court for Racine county to which he is sent, a second change, as a matter of right, for the prejudice of the people.

Provisions for change of venue are to be found in two separate chapters: ch. 119, Stats., entitled "The Place of Trial of Civil Actions," which includes secs. 2622, 2623, 2625; and again under ch. 190, Stats., entitled "The Change of Venue in Criminal Cases," which includes secs. 4679 and 4680.

By sec. 9, ch. 72, Laws 1897, by which chapter the municipal court in question was first established, it is provided that the general provisions of law relative to circuit and justices' courts and actions and proceedings therein, "*in civil*

and criminal cases," shall apply also to said municipal court unless inapplicable and except as otherwise provided in that act. This section has not been changed by the amendment to this law by ch. 117, Laws 1899, and recognized the applicability of and apparent difference between statutes relating to proceedings in civil and criminal actions.

Sec. 2622, Stats., provides for a change of the place of trial from the county wherein the action is brought "where there is reason to believe that an impartial trial cannot be had therein." By sec. 4679, relating to criminal actions, it is provided, where a fair trial cannot be had, that the court "may direct the person accused to be tried in some adjoining county where a fair and impartial trial can be had."

Each of these sections has a provision for an absolute restriction to but one change of venue in each cause. If sec. 2622 is to be construed as governing both civil and criminal proceedings, then there was no need of sec. 4679. Furthermore, sec. 4679 is not limited to proceedings in circuit courts alone, but gives the power of such removal to the *court* before whom a cause is pending for an offense punishable by imprisonment in the state prison. Such a statute is general in its nature and would apply to all courts of record having criminal jurisdiction, and would apply to the defendants in this case unless changed by the acts establishing such court.

In the case of *Dietz v. State,* 149 Wis. 462 (136 N. W. 166), on page 475 this court said, with reference to the denial of an application for a change of venue on the claim of prejudice on the part of the people of Sawyer county in an action in which an affidavit of prejudice had already been filed against the presiding judge, referring to sec. 4680, Stats., that there can be but one change of venue in a criminal action.

This broad language must also apply to these defendants unless a contrary intent can be found in the act in question.

The municipal court of Racine county is one created by

the legislature by virtue of the power given in sec. 2, art. VII, of the Wisconsin constitution, which provides for the vesting of jurisdiction in such municipal courts, with the limitation that their jurisdiction shall not exceed that of circuit courts. Such defendants then in the municipal court of Racine county, by the holding in the majority opinion, obtain that which is in effect a superior right or advantage over all other defendants wherever prosecuted and in a court which is constitutionally prohibited from having greater jurisdiction than circuit courts.

I cannot construe the act in question as overriding these considerations. It certainly does not do so by express language, and can only do so by a construction which seems to me to be an unnecessary strain upon legislative language.

As I read this act, the provisions in the first portion of sec. 5, ch. 117, Laws 1899, for a change of venue, apply only to civil actions. This may be seen by its express reference to the statutes that govern such actions, viz. secs. 2621, 2622, and 2625, which are found in ch. 119, Stats., as above stated. It also appears by implication by the omission of any reference to ch. 190, such as secs. 4679 or 4680.

It is fair to assume that the legislature had these general laws in mind when it passed the acts creating this municipal court and by the context of the same intended that the change of venue which is limited to a removal to the circuit court for Racine county related to civil actions only under ch. 119 and leaving the criminal actions to be disposed of under ch. 190, relating to just that class of actions, and under secs. 4679 and 4680. This construction would acquit the legislature of the rather ungraceful task of disposing of such important questions by any circuitous method and would place a defendant in the municipal court of Racine county in no other or different position than one in any other court in the state.

That portion of the act quoted and italicised in the opinion, "*except that when the venue of any action shall be so*

changed, it shall be changed to the circuit court of Racine county," can well be construed as relating to civil actions only, and such a limitation is well within the power of the legislature. That body might properly say that it would deprive the litigant in a civil action in the municipal court of the right to a change for the prejudice of the people to an outside county, while at the same time preserving intact for the defendant in a criminal action in the same court the right, under sec. 4679, of having the proceeding against him sent to an adjoining county where a fair and impartial trial may be had.

I fail to see any weight that can be given to the construction of the majority from the language in the act that when a change of venue shall have been had in a criminal case to the circuit court for Racine county the record shall be transmitted and certified to the circuit court, "which shall then have full jurisdiction of the action." This only makes clear and definite what undoubtedly would be definite and clear without it, viz. that when the circuit court gets jurisdiction it stands in the same situation as to that case that the municipal court did.

This view of the statute does not lessen any of the rights of the defendant. These rights can be protected in this instance as well as the rights of a defendant whose cause had been transmitted from an adjoining circuit to the Racine circuit and where it shall appear at any time that a fair and impartial trial cannot be had. In such event the court as a matter of necessity may, even on its own motion, take proper steps to assure to the defendants the fair and impartial trial that they are guaranteed under the constitution; just as the trial court exercised what was denominated "an extraordinary power" in discharging the jury and summoning a new panel, even after testimony had been taken on the trial of a defendant accused of murder, in the case of *Hedger v. State,* 144 Wis. 279, 298, 128 N. W. 80.

I think, therefore, a proper construction of this statute would be that the defendants are entitled to but one change of venue from the municipal court of Racine county; that if they elect to make it on the ground of the prejudice of the people it may be sent to an adjoining county for trial under sec. 4679, or if they elect to make it on the ground of the prejudice of the presiding judge it must be sent according to the provisions of sec. 4680, Stats.; that once having made such an election they can have no other or further change of venue other than may be given to a defendant in any other court under the inherent powers of the court.

I am authorized to state that Mr. Justice KERWIN joins with me in this opinion.

DURRE, Respondent, vs. WESTERN UNION TELEGRAPH COMPANY, Appellant.

February 13—March 13, 1917.

Telegraphs: Delay in delivering interstate message: Recovery for mental anguish: State and federal statutes.

1. Sub. 5, sec. 1778, Stats. (Laws 1907, ch. 165), giving a right to recover for mental anguish resulting directly from failure or negligence in delivering a telegram, was a valid exercise of the legislative power; but since Congress has, by the act of June 18, 1910 (36 U. S. Stats. at Large, 539, ch. 309), taken exclusive control of interstate telegraph business, no rights of action based upon such state legislation can arise as to that business except so far as they may be recognized by federal law or decisions.
2. Since the federal law still recognizes the common-law doctrine that mental anguish, except in cases affecting the liberty, character, reputation, personal security, or domestic relations of the party injured, cannot be the basis of an action and that such doctrine of nonliability applies in cases arising from negligence by a telegraph company in delivering messages, there can be no recovery under said sub. 5, sec. 1778, Stats., for mental anguish arising from delay in delivering interstate telegrams.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

The appeal is from an order granting plaintiff a new trial.

This was an action brought against the defendant telegraph company to recover damages for the mental anguish to the plaintiff caused by the failure of defendant to promptly deliver a telegram sent to her at Kenosha, Wisconsin, from Henderson, Kentucky, January 1, 1916, announcing the expected immediate death of plaintiff's father.

In the special verdict the jury found failure of ordinary care in the delivery of the message; that plaintiff suffered no mental anguish as the result thereof; that the defendant's failure to deliver the message was not the proximate cause of plaintiff's mental suffering; that plaintiff could have reached Henderson, Kentucky, in time to attend her father's funeral after receiving the message; and that plaintiff suffered no damages.

After verdict and motions by the respective parties the court ordered that the verdict be set aside and a new trial granted without costs on the grounds that the verdict was perverse; that the court erred in the form of the verdict and in the instructions to the jury; and that justice had not been done. From such order the defendant appeals.

For the appellant there was a brief by *Flanders, Bottum, Fawsett & Bottum,* attorneys, and *Albert T. Benedict,* of counsel, all of Milwaukee, and oral argument by *R. N. Van Doren* of Milwaukee.

Calvin Stewart of Kenosha, for the respondent.

ESCHWEILER, J. The plaintiff claims a right of action to recover for mental anguish resulting directly from and proximately occasioned by the negligence of the defendant telegraph company in delivering the dispatch, and it is based entirely upon sub. 5, sec. 1778, Stats., which changed the rule of the common law on that subject as it had been recog-

nized by this court in *Summerfield v. Western Union Tel. Co.* 87 Wis. 1, 57 N. W. 973. This statute so recognizing the right to recover for mental anguish has been held a valid exercise of the legislative power. *Nitka v. Western Union Tel. Co.* 149 Wis. 106, 135 N. W. 492.

The defendant by its amended answer set forth in substance that by the federal statute of June 29, 1906 (34 U. S. Stats. at Large, 584, ch. 3591), as amended by the act of June 18, 1910 (36 U. S. Stats. at Large, 539, ch. 309), Congress has taken exclusive control of interstate telegraph business, thereby extinguishing, except so far as they may be recognized by federal law or decisions, any rights of action predicated upon state legislation or decisions of state courts. The court below in its rulings upon defendant's offer of evidence and motions for nonsuit and for a directed verdict denied to defendant the right to rely upon such defense.

The provisions of the federal statutes applicable to the case at bar in substance provide that a telegraph company engaged in sending messages from one state to another of the United States shall be considered and held to be a common carrier; that all charges for any service rendered shall be just and reasonable; that messages by telegraph may be classified into day and night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged in the different classes; that it is unlawful to give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatever; that there must be filed by such company with the commission created by the act and kept open for public inspection schedules showing all its charges, rules, regulations, and practices. The law also provides that if it shall appear that any such regulations or practices are unjust or unreasonable the interstate commerce commission shall change the same.

It is further alleged by the answer that among the regulations established by it and conditions made a part of the contract for the sending of the message in question were provisions stating that the message in question was an unrepeated telegram and paid for as such; that in consideration thereof the company should not be liable for mistakes or delays in the delivery of such unrepeated telegram beyond the amount received for sending the same, and that in any event the defendant should not be liable for any mistakes or delays in such delivery beyond the sum of $50, at which amount the telegram was valued.

If by this law Congress has assumed exclusive control of interstate business the liability of the defendant in this case must be determined under the federal law, and state statutes and decisions must stand aside. *Chicago, M. & St. P. R. Co. v. Rock Co. S. Co.* 162 Wis. 374, 379, 156 N. W. 607; *State v. C., M. & St. P. R. Co.* 136 Wis. 407, 415, 117 N. W. 686; *Cincinnati, N. O. & T. P. R. Co. v. Rankin,* 241 U. S. 319, 36 Sup. Ct. 555; *Atchison, T. & S. F. R. Co. v. Harold,* 241 U. S. 371, 378, 36 Sup. Ct. 665; *Southern R. Co. v. Prescott,* 240 U. S. 632, 639, 36 Sup. Ct. 469; *Southern R. Co. v. Railroad Comm.* 236 U. S. 439, 446, 35 Sup. Ct. 304; *Erie R. Co. v. New York,* 233 U. S. 671, 681, 34 Sup. Ct. 756; *Boston & M. R. Co. v. Hooker,* 233 U. S. 97, 110, 34 Sup. Ct. 526; *Atchison, T. & S. F. R. Co. v. Robinson,* 233 U. S. 173, 180, 34 Sup. Ct. 556; *St. Louis, I. M. & S. R. Co. v. Edwards,* 227 U. S. 265, 269, 33 Sup. Ct. 262; *Southern R. Co. v. Reid,* 222 U. S. 424, 442, 32 Sup. Ct. 140.

The supreme court of the United States has held and determined that the federal law still recognizes the common-law doctrine that mental anguish, except in cases affecting the liberty, character, reputation, personal security, or domestic relations of the party injured, cannot be the basis of an ac-

tion, and that such doctrine of nonliability applies in cases arising from negligence by a telegraph company in delivering messages such as the one here involved.

A similar message to the one in the case at bar was delivered to a telegraph company in South Carolina addressed to the plaintiff in that case in Washington, D. C., and by negligence of the defendant at Washington was not delivered to the plaintiff in time. Suit was brought in South Carolina, which had a statute similar to ours giving a cause of action for mental anguish. A judgment against the telegraph company was affirmed by the supreme court of that state (*Brown v. Western Union Tel. Co.* 92 S. C. 354, 75 S. E. 542) under this statute, and on appeal to the United States supreme court the judgment was reversed on two grounds, one of which was that the South Carolina act, as applied in that case, was an attempt to regulate conduct within territory wholly under the jurisdiction of the United States; and second, that if construed as attempting to determine the conduct required of the telegraph company in transmitting a message from one state to another by determining the consequences of not pursuing such conduct, it is objectionable as an attempt to regulate commerce among the states. *Western Union Tel. Co. v. Brown,* 234 U. S. 542, 547, 34 Sup. Ct. 955, citing *Western Union Tel. Co. v. Pendleton,* 122 U. S. 347, 7 Sup. Ct. 1126.

The same doctrine as applied to a statute similar to the one involved in this case and in the case just above cited is found in *Western Union Tel. Co. v. Simpson,* 117 Ark. 156, 158, 174 S. W. 232.

The federal courts will not recognize any liability for mental anguish arising from delay in delivering a burial casket. *Southern Exp. Co. v. Byers,* 240 U. S. 612, 36 Sup. Ct. 410, reversing *Byers v. Southern Exp. Co.* 165 N. C. 542, 81 S. E. 741.

A statute of Virginia providing a penal forfeiture of $100 for failure of telegraph company to make prompt delivery was held to be abrogated by the federal legislation and actions based upon such statutes were dismissed. *Western Union Tel. Co. v. Bilisoly,* 116 Va. 562, 82 S. E. 91; *Western Union Tel. Co. v. First Nat. Bank,* 116 Va. 1009, 83 S. E. 424.

The absolute control of the federal legislation is recognized in the following state decisions: *Bailey v. Western Union Tel. Co.* 97 Kan. 619, 156 Pac. 716, reaffirmed in 160 Pac. 985; *Western Union Tel. Co. v. Bank of Spencer* (Okla.) 156 Pac. 1175. The question is also fully discussed in *Gardner v. Western Union Tel. Co.* 231 Fed. 405.

The two cases cited by respondent on this proposition do not affect the result. The one, *Ivy v. Western Union Tel. Co.* 165 Fed. 371, was decided in the circuit court of appeals (*Western Union Tel. Co. v. Ivy,* 177 Fed. 63, 100 C. C. A. 481) on another point and expressly passed by without deciding the question as to whether the Arkansas statute giving damages for mental anguish was an interference with interstate commerce. The other case, *Vermilye v. Western Union Tel. Co.* 207 Mass. 401, 93 N. E. 635, held that a recovery might be had under a statute of Massachusetts providing penalty for failure to transmit a message, and that it was not contrary to the federal regulations nor an interference with interstate commerce in a case where the refusal to transmit was because of a claim of violation of defendant's rules and regulations by the placing of a sticker on the front of the message by the sender.

If rules and regulations of the defendant company are unjust and unreasonable the proper forum for relief is undoubtedly the interstate commerce commission, as suggested in the opinion of Justice BRANDEIS in the recent case of *U. S. v. Merchants & M. T. Asso.* 242 U. S. 178, 187, 37 Sup. Ct. 24.

The conclusion thus reached that there can be no recovery

under sub. 5, sec. 1778, Stats., for mental anguish arising from delay in delivering interstate telegraph messages renders unnecessary any consideration of the other questions raised on this appeal. There being no suggestion made in the pleadings, the evidence, or on this appeal that there is any other ground for liability in favor of the plaintiff than that arising from mental anguish, the case may properly be disposed of now.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment for the defendant dismissing the complaint with costs.

JOHN BARTH COMPANY, Appellant, vs. BRANDY, imp., Respondent.

February 13—March 13, 1917.

Intoxicating liquors: Licenses: Licensee presumed to be owner of saloon: Liability for goods sold to person in charge.

1. A retail liquor license is a mere privilege to be enjoyed while the conditions and restrictions are complied with, implies special confidence and trust in the licensee, and can be assigned only as provided in the statute.
2. One who has obtained and holds a retail liquor license is responsible for whatever is done in that place of business by his agents, and must be presumed to be the owner and keeper of the saloon as to the general public and persons dealing with those conducting the business.
3. Thus, where B. personally obtained and held a license, although he did so for the purpose of helping one S. who ran the saloon for his own profit, he is personally liable for liquors sold to S. for such saloon, and it is immaterial whether the seller knew, at the time of the sale, that S. claimed to be the owner in fact of the business.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

The appeal is from a judgment dismissing plaintiff's complaint.

The plaintiff corporation is a wholesale liquor dealer. The defendant *I. Brandy* in the year 1914, on his personal application, obtained from the common council of the city of Kenosha a license to operate a saloon in that city. He was at the time and for several years had been engaged in a men's clothing and furnishing business about six or seven blocks away from the saloon. He took the license for the purpose of helping the defendant Schwartz, a poor man who wanted to run the saloon, and with the understanding that *Brandy* himself would not conduct it.

Plaintiff's salesman found defendant Schwartz in charge of the saloon and accepted Schwartz's order for goods. Under Schwartz's directions they were consigned to *I. Brandy* and delivered in Kenosha to one Grube, a drayman who was authorized to receive goods for *Brandy,* by general instructions not referring specifically to these liquors. The goods were used at the saloon in question and part payments made by Schwartz. Statements were sent by plaintiff to *Brandy,* but no response made by him, and attempts to collect of the defendant Schwartz were also made and payments made by him. Plaintiff dismissed the action as to defendant Schwartz.

Findings were made by the court to the effect that Schwartz was the owner of the saloon and the purchaser of the goods and not the agent of *Brandy,* who did not authorize Schwartz to purchase goods upon *Brandy's* credit; that *Brandy* paid none of the expenses and received none of the profits of the saloon business; that no inquiry was made by plaintiff of *Brandy* as to such sales or as to the authority of Schwartz; that plaintiff's agent knew at the time the orders for goods were taken that *Brandy* was in the clothing business; that such agent called upon the defendant Schwartz for payment, but did not demand the same of *Brandy.* Upon such findings the court determined that plaintiff was not entitled to judgment as against *Brandy,* and from the judgment dismissing the action the plaintiff appeals.

For the appellant there was a brief signed by *Geo. W. Taylor* of Kenosha, attorney, and a separate brief signed by *Umbreit, Mahon & Jenner* of Milwaukee, of counsel, and oral argument by *Mr. Taylor.*

For the respondent the cause was submitted on the brief of *Robert V. Baker* of Kenosha.

ESCHWEILER, J. By sec. 1550, Stats., it is made a misdemeanor, punishable by fine or imprisonment in the county jail, for any person to vend, sell, deal, or traffic in spirituous or intoxicating liquors without first having obtained a license or permit therefor as required by law. To obtain such permit under the law of this state, ch. 66, the person must make application in writing stating the kind of license applied for and designating the premises where such liquor shall be sold. The only statutory provision for assigning or transferring such license is in case of the death, during the license year, of such licensee. It is further provided under the same chapter that notice of such application for license shall be published before the granting thereof and a bond must be given before the delivery of the license, such bond to provide that the applicant will keep and maintain an orderly and well regulated house, will permit no gambling, and will not sell or give away liquor to certain classes of persons, such as minors or intoxicated persons.

It has already been held by this court that such a license is a mere privilege to be enjoyed while the conditions and restrictions are complied with, and implies special confidence and trust in the licensee, and from the very nature of things such license is not assignable at common law. *State v. Bayne,* 100 Wis. 35, 75 N. W. 403. Although the license is for a fixed term it comes to an end with the life of the licensee. *State ex rel. Rich v. Steiner,* 160 Wis. 175, 177, 151 N. W. 256. Even were the license assigned to Schwartz by *Brandy,* it would have been no protection for sales by

Schwartz except as agent for *Brandy*. *State v. Bayne, supra.*

It has also been held that the person having obtained and holding a license is responsible for whatever is done in that place of business by his agents in violation of law, even though it be against the express direction of the person having such license. *State ex rel. Conlin v. Wausau,* 137 Wis. 311, 118 N. W. 810; *Olson v. State,* 143 Wis. 413, 127 N. W. 975; *Reismier v. State,* 148 Wis. 593, 596, 135 N. W. 153.

Under this view of the situation that the law places a person in by the obtaining of such permit to conduct a saloon, he must be presumed to be such owner and keeper as to the general public and persons dealing with those conducting the business. Therefore goods sold in the manner of the transactions in this case and used in the conduct of the business must be held to have been sold to the person who in law was charged with the conduct and management of the business. It is immaterial whether plaintiff's agent knew, at the time of the sales, Schwartz claimed to be the owner in fact of the business. The defendant *Brandy* is estopped from now asserting that he was not such owner. It is perhaps to be regretted that one who undertook to play the part of the good Samaritan should be rewarded with such a penalty as the judgment in this case must be. We feel, however, it is the better policy that a person who has assumed to the city and the public at large the position that the defendant *Brandy* did by his application for and obtaining the license should be held to all the obligations that follow such an assumption.

By the Court.—Judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment for the plaintiff against the defendant *Brandy* in accordance with the prayer of his complaint.

HOPPE, Respondent, vs. PETERSEN, Appellant.

February 13—March 13, 1917.

Automobiles: Collision with buggy.

In an action for injuries alleged to have been caused by defendant's negligence in running his automobile into plaintiff's buggy, a finding by the jury that plaintiff's buggy was moving away from the traveled track, to the right, when struck by defendant's automobile approaching from the rear is *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Kenosha county: JAMES WICKHAM, Judge. *Affirmed.*

Action to recover compensation for damages claimed to have been caused by negligence of the defendant in so managing an automobile on a public highway that it collided with plaintiff's buggy, causing injury to his property and person.

The facts, as claimed by plaintiff and testified to by his witnesses, are these: September 4, 1914, while driving with his horses and buggy along a public highway, plaintiff was approached from the rear by defendant in an automobile. Upon signal by the latter, the former turned to the right except his left hind wheel was near the right edge of the traveled track. In that situation defendant drove his automobile so that it struck the wheel of the wagon, which was just leaving the track, causing the front of the automobile to become engaged with such wheel, whereupon the horses became frightened and broke from the buggy, dragging plaintiff over the dashboard to the ground and severely injuring him.

The evidence of defendant was to this effect: He was driving his automobile at a speed of four or five miles per hour. He sounded his horn when about 150 feet from plaintiff's buggy and again when about seventy feet therefrom. In response thereto plaintiff turned to the right entirely out of

the traveled track. There was but one track and the places where the wheels ran were some eight to twelve inches below the surface at the outer sides. When defendant had gotten nearly to the buggy, the horses swerved toward the track and the lines were slack. As plaintiff began to gather them up to turn the horses to the right, the left front wheel of the buggy slid into the nearby wheel track, causing the hub to collide with the fender of the automobile some twenty inches from the ground and back of the front wheel of the auto. Thereupon the horses jumped, causing the wagon hub to engage the fender and hold until the horses broke away causing the injury to plaintiff. About the time of the collision defendant made an attempt to turn to the left but was unable to do so on account of the deep ruts in the sand. The fender indicated that it had been shoved ahead slightly and there was an indentation on the outside of it, some two inches deep, about a foot from the running board and some twenty inches from the ground. There were indications in the sand that the wagon went alongside of the traveled track some little distance and then that the front wheel slid into the track as before indicated. After the collision, the hind wheel of the wagon was some eight inches from the fender of the automobile.

Both theories of the case were submitted to the jury for a special verdict, resulting in findings as follows: (1) Plaintiff's buggy was moving away from the traveled track on the right side when the collision occurred. (2) Defendant did not exercise ordinary care in operating his machine at and prior to the time of the collision. (3) Such failure to exercise ordinary care was the proximate cause of plaintiff's injury. (4) He did not fail to exercise ordinary care contributing to the injury. (5) It will require $500 to reasonably compensate him for his injury.

Judgment was rendered on the verdict in plaintiff's favor and defendant appealed.

Geo. W. Taylor of Kenosha, for the appellant.

For the respondent the cause was submitted on the brief of *Eberlein & Larson* of Shawano.

MARSHALL, J. This appeal presents the single question of whether the finding of the jury that plaintiff's buggy was moving away from the traveled track, to the right, when the collision occurred, is supported by the evidence. It is frankly conceded, as we understand the argument on behalf of appellant, that if such be the case, the judgment is right. The question turns on whether the evidence of plaintiff as to how the collision took place is believable, under all the circumstances. Counsel for appellant insists that it is not, particularly on account of some physical facts.

The trial court carefully considered all the circumstances pressed upon our attention as demonstrating that the collision could not have occurred as plaintiff claimed, and came to the conclusion that the evidence was not conclusive so as to warrant taking the case from the jury. After the verdict was rendered the matter was again carefully considered and the decision of the jury confirmed. In that situation, by established rules, it must now appear that the trial court was clearly wrong or the judgment should be affirmed.

The evidence has been carefully considered without our being able to reach a conclusion that there was no reasonable basis for submitting the question to the jury as to whether the accident happened as claimed by respondent.

It was the duty of the plaintiff to turn to the right of the center of the beaten track so as to allow appellant the left-hand part for a free passage, and if necessary on account of the condition of the road, to stop a sufficient length of time to allow appellant to pass. Sub. 1, sec. 1636—49*b*, Stats. There is no question but what respondent turned to the right as required and did more, and that appellant made no effort to turn out until shortly before the collision occurred. Of

course, if respondent saw fit to give way so as to allow appellant the use of the entire track, the latter might properly take it. That is what is claimed to have been the case. Yet it is significant that, though appellant signaled to respondent when 150 feet away, the latter was so situated, when the distance was reduced to seventy feet, that a second signal was given, quite clearly indicating that the buggy was then partly in the traveled track and that appellant had a considerable space before him for turning to the left. Notwithstanding the condition of the road, there is reasonable ground for believing that, with proper effort within that space, a turnout could have been effected. Instead of making any effort in that regard, he again signaled to respondent and proceeded until shortly before the collision before trying to turn to the left.

While it is claimed that appellant made the effort to turn to the left upon observing the horses swerving toward the track, the jury might reasonably have come to the conclusion that such effort was made because the left hind wheel of the buggy was then in the wheel track, thus corroborating respondent. The circumstances that the second signal was given when appellant was within some seventy feet of the buggy, the jury might reasonably have considered as discrediting the evidence that the buggy was wholly outside the traveled track for a considerable time before the point where the collision occurred.

We might further proceed at considerable length in discussing the evidence but will rest the case with the assurance that after careful consideration of it, the conclusion has been reached that the trial court was not clearly wrong in submitting the case to the jury and confirming the result.

By the Court.—The judgment is affirmed.

THOMSEN, Appellant, vs. CITY OF KENOSHA, Respondent.

February 13—March 13, 1917.

Contracts: Construction of sewer: Extra work: Evidence: Right to recover: Conditions precedent.

1. In an action to recover for extra and additional work claimed to have been done in performing a contract for the construction of a sewer, the evidence is *held* to sustain findings of a referee, approved by the trial court, that plaintiff had not sustained his claim except as to two items of extra work, and that as to those there had been no written agreement fixing the price and no presentation of the claim as required by the contract.
2. Because of the failure to comply with said conditions of the contract plaintiff was not entitled to compensation for the extra work done.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This is an action brought by plaintiff to recover for alleged additional work which he claims to have done in connection with the performance of a contract with defendant for the construction of a sewer.

On August 1, 1913, plaintiff submitted a bid and contract to furnish all the material and do all the work for the building of a sewer in the city of *Kenosha* by a certain route. After the submission to and signing of the contract by the plaintiff and before such contract was signed by the mayor and city clerk and accepted by the city, the city of *Kenosha* changed the route of the sewer because it was unable to procure certain easements. The plaintiff was advised of the change of the route, was furnished with a profile of the new route, went over this route with the city engineer, and agreed to build the sewer under the same bid and agreement which he had submitted for the sewer by the first proposed route.

The plaintiff contends that through accident or mistake the profile of the changed route failed to show that almost

1,000 more cubic yards of excavating was required on the new route than was necessary on the original route; that he did this excess excavating at an actual cost to him of $2.30 per cubic yard; that the original route required but two turns, while the sewer as built required four turns, and that this cost him for additional labor and material $140.25; and that he incurred additional expense for hauling away dirt from the excavations of the second route, which was not included in his bid and contract covering the work on the first route because the first route ran near a ravine where the dirt could have been dumped without hauling.

The defendant claims that the profile of the second or new route was correct, showing that practically the same amount of excavating would be required for the second route as for the first.

The referee found that the plaintiff had not sustained his claim of additional or extra work, excepting two items, namely, breaking the ground and building two catch-basins. He found further that plaintiff had failed to secure in writing authority for these extras, and reported that defendant was entitled to judgment dismissing plaintiff's complaint.

The circuit court approved the referee's report and entered judgment dismissing plaintiff's complaint on the merits and awarded the defendant costs and disbursements. From such judgment this appeal is taken.

Geo. W. Taylor of Kenosha, for the appellant.

For the respondent there was a brief by *John C. Slater,* and oral argument by *Mr. Slater* and *Mr. Edward F. Higgins,* both of Kenosha.

SIEBECKER, J. It appears without dispute that the sewer could not be constructed on the route specified in the original plans and profile, upon which plaintiff made his bid to construct the sewer; that plaintiff was informed of this fact after he had submitted his bid and before the city had entered

into a contract for the construction of the sewer with him and that the common council had changed the route of the sewer to the one on which it was built. The plaintiff accepted this change of route and entered into the contract for its construction pursuant to the plans and profile furnished him of the new route. The evidence shows that plaintiff entered upon the work of constructing this sewer about September 17, 1913. The contract provides that the sewer was to be completed on or before January 1, 1914, but the work of construction was not in fact finished until the month of May, 1914. The referee found that plaintiff received payment of the full contract price. This is abundantly supported by the evidence.

It is argued that the plaintiff's claim for constructing two catch-basins, for excavating 1,000 cubic yards of earth, and hauling and scraping earth were all items in excess of what was required under the plans and profile on the original route, and that the extra cost of these items and the cost for extra liability insurance constitute additional work and cost not contemplated by the contract. It is obvious from the facts presented that all of these items were a part of the work of construction included in the contract and under the evidence they are extra work within the stipulations of the contract. The evidence sustains the referee's finding that there was no extra excavating. The contract included all the work of excavation included in the construction of the sewer on the new route. The court and referee also properly held that the plaintiff is not entitled to recover for the extra "breaking frost" and "two catch-basins" upon the ground that it was not ordered by the city nor was the price of the extras agreed upon in writing and signed by the plaintiff and the street committee before the extras were furnished as required by the contract for the construction of the sewer; nor was the claim therefor presented in writing to the city with-

in fourteen days from the time the alleged items of expense were in fact incurred.

The circuit court properly held that the referee's findings are not contrary to the clear preponderance of the evidence, that they should be affirmed, and that defendant is entitled to judgment dismissing plaintiff's complaint.

By the Court.—The judgment appealed from is affirmed.

WILL OF SMITH: BAKER and another, Respondents, vs. MANN, Executor, and another, Appellants.

February 13—March 13, 1917.

Wills: Construction: Fee or life estate?

That part of a will whereby the fee of all testator's real estate was devised to his son was revoked by a codicil in which said real estate was devised to the son "for his sole use and purpose during the term of his natural life providing there be no issue, then said real estate to be sold and the proceeds to be equally divided between my grandchildren share and share alike." *Held*, that testator's intention was to give the real estate absolutely to the son in case he had issue, and if not, to give him merely a life estate.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Reversed.*

The construction of the will of Benjamin Smith, made on the 13th day of July, 1883, and codicil added August 4, 1885, is the question involved upon this appeal. The will is as follows:

"First. It is my will that all of my just debts and funeral expenses be paid with all convenient speed after my decease.

"Second. I hereby give and bequeath to my beloved wife, Philinda Smith, all of my household furniture which she may select; the use of one half of my dwelling house—said

half to be selected by her, on my farm in the said town of Caledonia, during her natural life. Also the sum of three hundred and sixty dollars per year to be paid her by my executor hereinafter named semi-annually during her natural life from my estate and at her death her funeral expenses are to be paid out of my estate.

"Third. After the death of my wife I hereby give, devise, and bequeath to my son, Samuel G. Smith, all of the real estate of which I may die seized. Also all the stock, tools, and farming implements which may be on said real estate and farm at the decease of my said wife.

"Fourth. I hereby give, devise, and bequeath to my daughter, *Mary Ann Baker,* after the death of my wife, the sum of one thousand dollars.

"Fifth. After the death of my said wife I hereby give, devise, and bequeath to my daughter, *Sarah Jane Summerton,* the sum of one thousand dollars.

"Sixth. After the death of my said wife I hereby give, devise, and bequeath to my granddaughter, Laura F. Summerton, the sum of two hundred dollars.

"Seventh. After the death of my said wife I hereby give, devise, and bequeath all the rest and residue of my property to my children, *Mary Ann Baker,* Samuel G. Smith, and *Sarah Jane Summerton,* to be divided equally between them share and share alike.

"Eighth. I hereby nominate and appoint my said wife, Philinda Smith, and my son, Samuel G. Smith, executors of this my last will and testament, and I hereby will and direct that they have the care, management, control, and use of my property, both real and personal, during the lifetime of my said wife, and out of the income arising from the use of my said property my executors are directed to pay to my said wife semi-annually the sum of one hundred and eighty dollars, making a year's payment of three hundred and sixty dollars, and should the income arising from the use of my property after deducting expenses be more than sufficient to pay said sum of three hundred and sixty dollars annually to my said wife, I hereby will and direct that the surplus, after making such payment, be equally divided between my said wife, Philinda Smith, and my children, *Mary Ann Baker, Sarah Jane Summerton,* and Samuel G. Smith, share and share alike."

The second paragraph of the codicil is as follows:

"Second. After the death of my wife Philinda Smith, I hereby give, devise and bequeath to my son Samuel G. Smith, all of the real estate of which I may die seized for his sole use and purpose during the term of his natural life providing there be no issue, then said real estate to be sold and the proceeds to be equally divided between my grandchildren share and share alike."

The first paragraph of the codicil revokes that part of the will which provides that after the death of the testator's wife he gives to his son, Samuel, all the real estate of which he may die seized; and the third paragraph revokes that part of the will appointing his son, Samuel G. Smith, as one of the executors and nominates his wife sole executrix without bonds.

Samuel G. Smith married September 21, 1883, and his daughter, *Viola Smith,* now by marriage *Viola Lower,* was born May 23, 1886. Samuel G. Smith died testate December 1, 1913, survived by said daughter and having named *Isaac O. Mann* executor and trustee. *Mann* duly qualified as such executor and trustee and was acting as such at the time this action was commenced.

The county court held that the real estate, on the death of the testator and of issue born to Samuel G. Smith, became the property of Samuel in fee, subject only to the rights of the widow.

The circuit court on appeal reversed the decision of the county court and held that Samuel took only a life estate and that the fee of the real estate passed by the residuary clause to *Mary Ann Baker, Sarah Jane Summerton,* and *Viola Lower,* daughter of Samuel G. Smith, jointly and equally.

The executor and trustee, *Isaac O. Mann,* appealed to this court from the judgment of the circuit court.

D. H. Flett and *W. D. Thompson* of Racine, for the appellant *Mann.*

For the appellant *Lower* there was a brief by *Gittings & Janecky* of Racine, attorneys, and *O'Connor & Burns* of Milwaukee, of counsel, and oral argument by *C. C. Gittings* and *Geo. A. Burns.*

For the respondent there was a brief by *Simmons & Walker* of Racine, and oral argument by *M. E. Walker.*

KERWIN, J. Three contentions are made in this case: (1) Counsel for *Isaac O. Mann,* trustee under the last will of Samuel G. Smith, deceased, contends that at the time of the death of said Samuel G. Smith, issue having been born to him, said Samuel G. Smith was the owner in fee of the real estate in question, and upon the admission of his will to probate the fee vested in said trustee for the benefit of *Viola Lower,* daughter of said Samuel G. Smith, which construction was sustained by the county court. (2) *Mary Ann Baker* and *Sarah Jane Summerton,* daughters of Benjamin Smith, deceased, contend that the real estate is either intestate property or passed by the residuary clause of the will of said Benjamin Smith, and that upon the death of Samuel G. Smith the property vested in equal undivided shares in *Mary Ann Baker, Sarah Jane Summerton,* and *Viola Lower,* only surviving child of Samuel G. Smith, deceased. (3) *Viola Lower,* as sole surviving heir at law of her father, Samuel G. Smith, contends that on the death of her father she, by implication, became the owner in fee of the real estate in question.

It is clear from the original will that the testator, Benjamin Smith, intended to dispose of his entire estate, and it is likewise clear that he intended to give the real estate—a farm—and "all the stock, tools, and farming implements" to his son, Samuel G. Smith. The uncertainty arises from the second paragraph of the codicil, set out in the foregoing statement of facts. The codicil was not drawn by a lawyer and is not clear. The circuit court in reversing the county court

and in holding that Samuel G. Smith took only a life estate, and that the fee of the farm passed by the residuary clause to *Mary Ann Baker, Sarah Jane Summerton,* and *Viola Lower,* daughter of Samuel G. Smith, jointly and equally, arrived at its conclusion by a system of punctuation and change of words, which we think was not warranted.

Samuel G. Smith having married September 21, 1883, and no issue having been born until May 23, 1886, and the codicil having been made August 4, 1885, the testator, Benjamin Smith, might reasonably have inferred that no issue would be born to Samuel, and this may have induced the making of the codicil. It is doubtless true that some cause existed for the codicil, and we think it reasonable to infer, although the language is not plain, that his purpose was to give the real estate and farm implements absolutely to his son, Samuel, in case he had issue, and if not, to simply give him a life estate. This we think is the natural and reasonable construction to be drawn from the original will and codicil in connection with all the facts and circumstances appearing in the case, and, if such were the intention of the testator, then such intention must be followed. *In re Donges's Estate,* 103 Wis. 497, 500, 79 N. W. 786; *Will of Ehlers,* 155 Wis. 46, 143 N. W. 1050; *Will of Allis,* 163 Wis. 452, 157 N. W. 548, 158 N. W. 330; *Will of Waterbury,* 163 Wis. 510, 158 N. W. 340.

The county judge in his opinion said:

"The codicil first revokes that portion of the third clause of the will which gives Samuel the fee to the real estate, while the second paragraph of the codicil puts back into the will the identical words appearing in the original will, except that he added the name of his wife and has spelled the word 'seized' siezed instead of seized. Had he stopped here, the codicil would have been identical with the original will and Samuel would have taken a fee to the land. In the language following he undertakes to qualify and modify the gift to his son, and by adding 'for his sole use and purpose during the term of his natural life' he changed his gift from a fee to a life es-

tate. Had he gone no further there can be no doubt that his son would have taken but a life estate, but he evidently wished to modify this life estate, for he added a proviso in the words 'providing there be no issue.' This last clause, in my judgment, has to do with the words creating the life estate and reasonably means that, should there be issue, then the words 'for his sole use and purpose during the term of his natural life' would be inoperative. The 'proviso' relates to the life estate, for the very nature of the words 'there be no issue' are relative to the subject under consideration, to wit, whether to give his son the fee or a lesser estate."

The court is of opinion that the county court properly construed the will and codicil, therefore the judgment of the circuit court must be reversed.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to enter judgment adjudging the fee of the real estate in question to have been in Samuel G. Smith at the time of his death in accordance with the original judgment and decree of said county court, and remit the record to the county court for further proceedings according to law.

PRINCE, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

February 13—March 13, 1917.

Railroads: Fences: Depot grounds: Injury to person walking beside track: Contributory negligence.

1. Ordinarily the question whether the *locus in quo* of an accident is depot grounds which need not be fenced is one for the jury; but the evidence as to the location and use of the part of the road where the injury occurred or where it is claimed the fence should be may be so clear and free from conflict that it can be said as a matter of law that the place is or is not depot grounds.
2. The place where passengers get off and on trains, and where goods are loaded and unloaded, and all grounds necessary, con-

venient, and actually used for such purposes by the public and by the railway company, including the place where cars are switched and trains made up; also the place where tracks are used for storing cars, and where the public require open and free access to the railroad for the purposes of such business, constitute depot grounds.

3. Plaintiff, an adult familiar with the frequent passage of trains in that locality, was struck and injured by an engine in defendant's depot grounds. He testified that at a street crossing he had looked south and saw no train, though he says one might have been there about 100 feet away. The view to the south was unobstructed for a mile or more. He then turned north and walked about ninety feet along a path five or six feet from the track and when he came to some water or a muddy place he stepped toward the track and was instantly struck by the engine. He had not looked for a train from the time he left the street. *Held*, that he was guilty of contributory negligence as a matter of law.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Action to recover damages for personal injuries sustained on the 3d day of August, 1915, in the city of Kenosha by being run into by one of defendant's engines. Plaintiff, whose place of business was close to defendant's Y track connecting its north and south main tracks with a track running west, walked west on Market street, crossed the two main tracks and one switch track, and then turned in a northerly direction, following a well-worn path running on the westerly side of and parallel with the connecting or Y track, which curves to the west. About ninety feet north of Market street there was some water or a muddy place in the path, and when plaintiff reached it he turned in towards the track to avoid it and at the same instant he was hit by the pilot beam of the engine, thrown to one side, and was injured.

The evidence showed that there was no cattle-guard or wing fences at Market street and that the path upon which plaintiff walked was used daily by a large number of people. It also showed that plaintiff looked south for a train when

crossing Market street; thought he did not see any, though he says there might have been one just south and about 100 feet to his left, and that he walked from Market street to the place he was hurt without looking to see if a train was coming. At the close of the testimony on both sides the court directed a verdict for defendant, and from a judgment entered accordingly the plaintiff appealed.

For the appellant there was a brief by *Calvin Stewart* and *A. E. Buckmaster* of Kenosha, and oral argument by *Mr. Stewart.*

R. N. Van Doren of Milwaukee, for the respondent.

VINJE, J. The correctness of the trial court's ruling in directing a verdict for the defendant depends largely upon the question whether or not the *locus in quo* was within that part of defendant's road required to be fenced or whether it constituted depot grounds within the meaning of sec. 1810, Stats. 1915, which grounds need not be fenced. If the *locus in quo* was required to be fenced, then liability follows if plaintiff's entry upon the tracks was caused in whole or in part by the absence of the fence, and contributory negligence does not bar recovery. But if it was depot grounds not required to be fenced, then contributory negligence would bar recovery. This question was not directly passed upon by the court below and was not sharply litigated, though the pleadings and evidence present the issue. The trial court held that plaintiff could not recover even though the place of accident was required to be fenced and there was no fence. We do not find it necessary to decide that question in disposing of the case.

Ordinarily the question whether the *locus in quo* of an accident is depot grounds is for the jury. *McDonough v. M. & N. R. Co.* 73 Wis. 223, 40 N. W. 806; *Grosse v. C. & N. W. R. Co.* 91 Wis. 482, 65 N. W. 185; *Schwind v. C., M. & St. P. R. Co.* 140 Wis. 1, 121 N. W. 639. But the evidence

upon the question of the location and use of the part of the road where the injury occurred or where it is claimed the fence should be may be so clear and free from conflict that it can be said as a matter of law that the place is or is not depot grounds. The present case presents the latter situation. The place where passengers get off and on trains, and where goods are loaded and unloaded, and all grounds necessary, convenient, and actually used for such purposes by the public and by the railway company, including the place where cars are switched and trains made up; also the place where tracks are used for storing cars, and where the public require open and free access to the railroad for the purposes of such business, constitute depot grounds. *Plunkett v. M., S. S. M. & A. R. Co.* 79 Wis. 222, 48 N. W. 519; *Grosse v. C. & N. W. R. Co.* 91 Wis. 482, 65 N. W. 185; *Mills & Le Clair L. Co. v. C., St. P., M. & O. R. Co.* 94 Wis. 336, 68 N. W. 996. See, also, note in 7 L. R. A. N. S. 203. In the light of the above definition of what constitutes depot grounds, it is quite clear that the place where plaintiff entered upon the track at Market street as well as the place of injury were within such definition. A plat showing the defendant's depot, yards, and tracks for a considerable distance north and south of the place of accident was received in evidence and it, together with oral testimony, showed that plaintiff was hurt about 600 feet south of the depot at Kenosha; that immediately north of the station was a large number of switch tracks; that at least four of them connected with the main track to the west and two extended south across Market street and ran to quite extensive yards lying some distance south thereof; and that the Y track on which plaintiff was injured was one of the busiest parts of the yard in Kenosha.

There being no duty to fence, the question recurs whether plaintiff was guilty of contributory negligence. He testified that on crossing Market street he looked south and saw no train, though he says one might be standing there about 100

feet to the left. The view south was unobstructed for a mile or more, and the train that struck him must have been plainly visible had he looked and charged his mind with what he was doing. According to the fireman, who was the only member of the train crew that saw him before he was injured, he walked north along the path about five to six feet from the track, and when he came to the water he stepped toward the track just in front of the engine and was instantly struck by the pilot beam and hurt. He says he did not look for a train from the time he left Market street. Such conduct in a grown person familiar with the frequent passage of trains over those tracks and in full possession of his senses spells negligence as a matter of law, and the trial court properly directed a verdict for the defendant.

By the Court.—Judgment affirmed.

METROPOLITAN INVESTMENT COMPANY, Respondent, vs. CITY OF MILWAUKEE and another, Appellants.

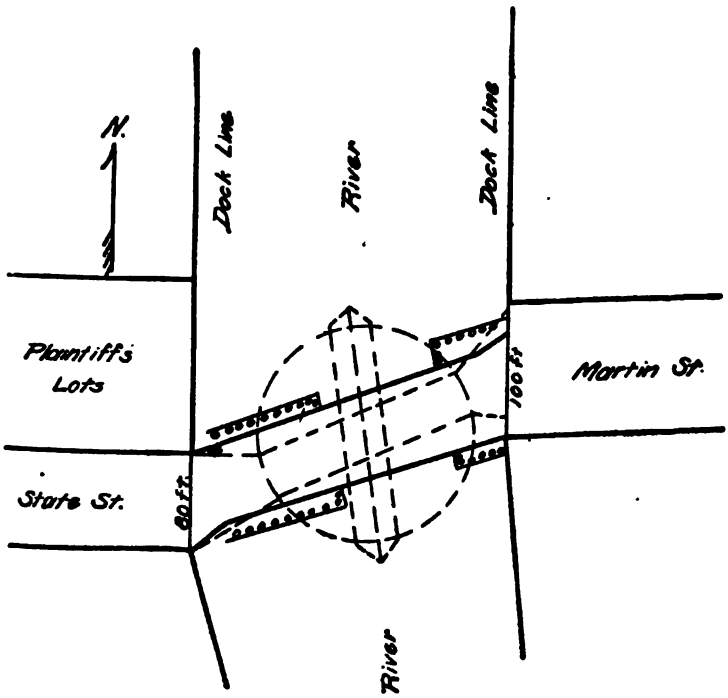
February 14—March 13, 1917.

Waters: Riparian ownership on river: Public easement opposite street end: Boundaries: Prescriptive rights: Extent: Bridges: Condemnation of land.

1. The riparian owner on a stream which is not a state boundary line takes to the center of the stream, subject to the rights of the public to use the stream, and the boundaries of the riparian lot are to be produced to the center of the stream at right angles with the center line.
2. The boundaries of the public easement over the stream opposite a street end are determined in the same manner; and a bridge extending beyond such boundaries and encroaching upon the submerged land of an adjacent riparian owner cannot be built by a city without first condemning the land.
3. No right acquired by prescriptive use exceeds the extent of the use. Hence a prescriptive right acquired by a city, by the maintenance of a swing bridge over a river, to use certain space above the water for the swing of the bridge, carried no right to build a permanent structure on that part of a riparian owner's submerged land which is under the arc of the swing.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

This is an action in equity by a riparian owner to enjoin the erection of a new bridge across Milwaukee river because it is alleged that thereby the plaintiff's river frontage will be injured and its submerged land in the river bed be trespassed upon. The situation will be more easily understood by reference to the accompanying diagram. As will be seen, the



Old bridge in dotted lines.
Proposed bridge in solid lines.
Circle shows swing of old bridge.

Milwaukee river at the point in question runs straight north and south; it begins to curve toward the east at the south line of State street. Plaintiff's lots are on the north side of State street and run to the west bank of the river. Mar-

tin street as traveled and improved for more than forty years lies to the north of State street, so that any bridge connecting the two streets must cross the river diagonally. Martin street as originally platted reached the east side of the river directly opposite the end of State street. There was a bayou at this point which was filled by property owners about the year 1859, and about the year 1871 the north eighty feet of the present street indicated on the diagram was opened up by voluntary action of property owners and called Martin street, since which time the originally platted end of Martin street has not been used as a highway but as private property. In 1871 the city constructed a swing bridge across the river, connecting State street and the new Martin street, which has remained in use up to the present time, and its location is indicated by the dotted lines upon the diagram. In 1876 the county board of supervisors of Milwaukee county by resolution attempted to vacate the end of Martin street as originally laid out. In the revised charter of Milwaukee passed in 1874 (ch. 184, Laws 1874) the city was required to "maintain and support" a number of existing swing bridges over the river, and among them was the bridge "from Martin street in the Seventh ward to State street in the Second ward." A larger bridge is needed to accommodate public travel, and proceedings looking towards its construction were commenced in 1912. A bond issue of $150,000 for the purpose was voted in November of that year and the bonds have been sold. Proceedings to widen Martin street by condemning twenty feet along the south side thereof have been taken. In 1915 a plan calling for a two-leaf bascule bridge covering the space included within the solid lines in the diagram was adopted by the common council, and this is the structure whose erection is sought to be enjoined. If built, the long central pier lengthwise of the river, indicated in the diagram, will be removed, and there will be a single ninety-foot draw near the east side of the river, the distance from the east end of State street to the draw being 136 feet and from the west

end of Martin street to the draw being 58 feet. Rows of protection piling on the north and south sides of the approaches to the draw are to be put in as indicated on the diagram. The circuit court found that by the building of the bridge a substantial part of the plaintiff's property in the bed of the river in front of plaintiff's shore line would be taken by the city and that the value of plaintiff's property for wharfage purposes would be materially interfered with. From these premises the court concluded that the plaintiff was entitled to have the building of the bridge enjoined until that portion of plaintiff's property necessary to be taken has been condemned. Judgment being entered in accordance with this finding the city appeals.

For the appellants there was a brief by *Clifton Williams,* city attorney, and *Mark A. Kline,* assistant city attorney, and oral argument by *Mr. Kline.*

For the respondent there was a brief by *Fredk. W. v. Cotzhausen,* attorney, and *F. P. Hopkins,* of counsel, both of Milwaukee, and oral argument by *Mr. Hopkins.*

WINSLOW, C. J. It is settled in this state that a riparian owner on a stream (not a state boundary line) takes to the center of the stream, subject to the rights of the public to use the stream, and that the boundaries of the riparian lot are to be produced to the center of the stream at right angles with the center line. *Farris v. Bentley,* 141 Wis. 671, 124 N. W. 1003. The boundaries of the public easement opposite a street end are determined in the same manner. *Superior v. Northwestern F. Co.* 164 Wis. 631, 161 N. W. 9.

These principles determine the present controversy and compel affirmance of the judgment. Milwaukee river runs practically north and south opposite the plaintiff's property and for some distance to the northward: therefore the south boundary of plaintiff's property (which constitutes the north line of State street) runs almost, if not directly, east to the center of the river. The bridge as proposed to be built en-

croaches upon the plaintiff's submerged land considerably. It follows that the city must condemn such land before it can build its bridge.

The fact that the city has maintained a swing bridge here for forty years and that part of the river bed now to be permanently occupied is directly under the arc made by the swing of the bridge when in use cuts no figure. No right acquired by prescriptive use exceeds the extent of the use. *Chippewa & F. Imp. Co. v. Railroad Comm.* 164 Wis. 105, 159 N. W. 739. The city may have acquired a right to use the space above the water for the swing of a swing bridge, but this carries no right to build a permanent structure on that part of the bed now under the arc of the swing.

We see no reason to doubt that the city has a right (subject to preliminary condemnation of the river bed as before stated) to connect State street and Martin street as now opened and traveled with a bridge. Martin street as originally platted between River street (now Edison street) and the river has apparently ceased to exist by nonuser.

By the Court.—Judgment affirmed.

ESCHWEILER, J., took no part.

HIRSCH ROLLING MILL COMPANY, Respondent, vs. MILWAUKEE & FOX RIVER VALLEY RAILWAY COMPANY, Appellant.

February 14—March 13, 1917.

Statute of frauds: Oral modification of written contract: Validity: Estoppel: Pleading.

1. Where the parties to a written contract for the sale and delivery of goods made an oral agreement extending the time for delivery, and the seller relied thereon and but for such agreement would have made delivery within the time previously specified, the buyer is estopped from asserting that such oral modification of the written contract was invalid under the statute of frauds.

2. Such estoppel is *held* to have been sufficiently pleaded in this case, every material fact necessary thereto being alleged except the fact that the seller relied upon the oral agreement and but for it would have made delivery in accordance with the written contract, and that fact being, under all the circumstances, inferentially pleaded by an allegation to the effect that the buyer had waived performance.
3. An estoppel need not be specially pleaded if the facts showing it are within the issues made by the pleadings and the evidence showing it is admissible for any purpose thereunder.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Action for damages for breach of contract. As a result of dealings had between the parties prior to November 8, 1907, plaintiff had delivered at Elkhart Lake station in the county of Sheboygan ten railroad cars loaded with steel rails and angle bars. These rails the defendant had refused to accept. As an adjustment of the controversy the parties, on November 8, 1907, entered into a new contract, by the terms of which it was provided that the plaintiff should sell and the defendant purchase six miles of track rail at $30.50 a ton, estimated at about 600 tons, one half of such rails to be delivered at Elkhart Lake before November 28, 1907, and the remainder within forty-five days, or by December 23, 1907. The contract provided for the disposition of the rails shipped under the prior arrangement and that plaintiff rebate to the defendant the amount which had been paid on the prior contract. It is undisputed that under the new contract of November 8th, one half of the rails, or about 300 tons, were delivered and paid for. On November 11, 1907, there was a written modification of the contract of November 8th, by which it was agreed that the ten carloads might be shipped to some other place and be inspected there, or that plaintiff might in lieu of that supply other rails. On November 12th, by telegram, confirmed by letter December 7th, there was an agreement to take sixty-one and one-half pound rails instead of those specified in the contract. By letter dated Decem-

ber 3d plaintiff announced its readiness to deliver the remaining 300 tons. On December 14, 1907, a thirty-day extension was granted to January 22, 1908, for the delivery of the remainder of the rails. No more of the rails were ever delivered. The parties met on January 3, 1908, in Indiana, and plaintiff contends that at that time there was an oral agreement made by the parties by which the time of delivery was extended from January 22, 1908, to February 1, 1908, and, if plaintiff should request it, a further extension to February 22d. The defendant denies the making of this oral agreement. January 9, 1908, plaintiff sent a proposed extension of time to defendant's agent. No answer appears to have been made to this until some time subsequent. On January 18, 1908, the defendant gave notice that it would not grant the extension and that plaintiff would be held to its original contract. This notice was received by plaintiff January 20th, too late to permit delivery of the rails by January 22d. Delivery was thereafter tendered by the plaintiff and refused by the defendant as being too late.

A jury trial was had, and the jury found (1) that there was an oral agreement between the parties extending the time of delivery of the rails after January 22, 1908, and (2) that such extension was made at the request of the plaintiff. It was stipulated that if the plaintiff was entitled to recover it was entitled to recover $900 and interest. Upon the verdict and stipulation judgment was entered accordingly, from which the defendant appeals.

For the appellant there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *Paul R. Newcomb,* of counsel, all of Milwaukee, and oral argument by *Mr. Newcomb.*

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *Carl Muskat.*

ROSENBERRY, J. Defendant contends that the contract of November 8th, being one required by the statute of frauds to

be in writing, cannot be modified by parol agreement so as to extend the time for delivery of the rails beyond January 22, 1908. We do not find it necessary to determine that matter in this case. The jury having found that the defendant did make a parol agreement by which the time of performance was extended beyond the 22d day of January, 1908, and it appearing by the undisputed testimony that plaintiff relied thereon, and it appearing that but for such oral agreement it would have made delivery within the time specified in the contract, we are of the opinion that defendant is estopped from taking advantage of the failure of the plaintiff to comply with the terms of the original contract. *Thompson v. Poor,* 147 N. Y. 402, 42 N. E. 13; *Smiley v. Barker,* 83 Fed. 684; *Stearns v. Hall,* 9 Cush. 31; *Kingston v. Walters,* 16 New Mex. 59, 113 Pac. 594; *Scott v. Hubbard,* 67 Oreg. 498, 136 Pac. 653; *Longfellow v. Moore,* 102 Ill. 289. One party to a contract cannot invoke the statute of frauds to close the door to a trap in which the other party may be caught by reason of having relied upon an oral agreement made between the parties. Here the plaintiff tendered performance within the time fixed by the parol agreement and the defendant refused to accept the goods for the reason that the offer to perform was too late. Under the facts in this case the defendant is estopped from asserting the invalidity of the parol agreement and must respond in damages.

Appellant urges that plaintiff cannot have the benefit of an estoppel in this action because an estoppel was not pleaded. Ordinarily estoppel must be pleaded. *Lawton v. Racine,* 137 Wis. 593, 119 N. W. 331. However, if the facts showing the estoppel are within the issues made by the pleadings and the evidence showing the estoppel is admissible for any purpose thereunder, it is not necessary that the estoppel should be specially pleaded. In this case every material fact necessary to create an estoppel was alleged in the pleadings, except there was no allegation therein that plaintiff relied upon the oral agreement and for that reason failed to make

delivery within the time specified in the contract. The complaint, however, does contain an allegation that the plaintiff duly discharged all of its obligations under said contract by the performance and tender of performance and by waiver of performance by the defendant, or all or part of such methods. Under the circumstances of this case an allegation that the defendant has waived performance is equivalent to an allegation that the plaintiff acted upon the parol agreement, for otherwise there could be no waiver. The plaintiff having acted upon the parol agreement must have relied upon it. While waiver and estoppel are not always the same, the terms are often used interchangeably. *Roberts v. Northwestern Nat. Ins. Co.* 90 Wis. 210, 62 N. W. 1048. The evidence establishing the fact that plaintiff did so rely upon the parol agreement and that except for it delivery would have been made in accordance with the terms of the original contract as modified, was brought out upon cross-examination by the defendant and came in without objection. We are of the opinion that the trial court correctly held that estoppel was sufficiently pleaded.

By the Court.—Judgment affirmed.

STEINKOPF vs. STEINKOPF, Appellant, and another, Respondent.

February 14—March 13, 1917.

Divorce: Judgment: Construction: Alimony or division of property? Irregularity: Agreement between parties: Monthly payment charged as lien on land: Life estate in homestead.

1. Under sec. 2364, Stats., a divorce judgment may award alimony to the divorced wife or may make a final division of the husband's estate, but may not do both.
2. A judgment providing that the husband shall pay to the divorced wife a certain sum per month during her life, as alimony; that the payment of that sum be charged as a lien upon a part of his

real estate; and that in addition thereto the wife be awarded the sole use and occupation of the homestead during her life and also be awarded the household furniture, etc., is *held* to have been intended as a judgment making a final division of the husband's estate; and the provision for a monthly payment, being an award of alimony, was an irregularity therein.

3. The terms of such judgment being definite and unambiguous, the alleged fact—not in any way shown by the record—that it was based upon an oral agreement between the parties cannot be made the basis of a construction of the judgment.

4. After the death of the husband, who had made the monthly payments without objection during his lifetime, upon a petition for an order terminating the divorced wife's interest in his property it is *held* that the real estate charged with the lien of such payments should be freed therefrom, but that the divorced wife is entitled to hold as her separate property the life estate in the homestead and also the personal property awarded to her by the judgment.

APPEAL from an order of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Reversed.*

This is a petition by *Martha Steinkopf,* the widow of John H. Steinkopf, asking for an order terminating the interest of the defendant, *Bertha Steinkopf,* in the plaintiff's property as the divorced wife of John H. Steinkopf.

In 1906 the plaintiff, John H. Steinkopf, brought an action for divorce against his then wife, the defendant *Bertha Steinkopf.* She counterclaimed for a divorce against him. Before trial of the action the parties entered into an oral stipulation with regard to making provision for the defendant's support. After such stipulation had been made defendant withdrew her counterclaim for divorce. The judgment in the divorce action provides that the defendant is to receive $25 per month as alimony during the term of her natural life and that the payment thereof be charged as a lien upon certain real estate of the plaintiff. Furthermore the judgment awards to the defendant the use of their homestead in the city of Milwaukee and the household furniture and furnishings, silverware, pictures, etc., belonging to the par-

ties. The defendant continued to occupy the homestead and is still occupying it. She also received payment of $25 per month up to the time this proceeding was commenced.

The plaintiff married the petitioner shortly after the divorce and died on the 9th of March, 1910.

The circuit court ordered that the payment of $25 per month to defendant be terminated and that the real estate described in the divorce judgment be freed of all lien of the judgment and the defendant divested of all right, title, and interest in and to said properties. From such order this appeal is taken.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles,* of counsel, all of Milwaukee, and oral argument by *J. V. Quarles.*

For the respondent there was a brief by *Jeger & Klingelhoefer* of Milwaukee, and oral argument by *L. M. Jeger.*

SIEBECKER, J. The claim is made in behalf of *Bertha Steinkopf* as the divorced wife of John Steinkopf that she is entitled to the payment of $25 per month and the use of the homestead during the term of her natural life under the terms of the divorce judgment. The trial court held that *Bertha Steinkopf's* right to such payments and the use of the homestead under this judgment terminated at the death of John Steinkopf, which occurred March 9, 1910. This conclusion was evidently based on the idea that the provision of the judgment for the benefit of *Bertha Steinkopf* constituted an award of alimony. The conduct of the parties since the entry of the judgment to the time of this application harmonizes with the claim that they treated it as a judgment giving the divorced wife a life interest in her former husband's estate and entitling her to receive $25 per month during her life. It is claimed that the terms of the judgment award her such an interest and that she is entitled to enforce payment of the $25 per month as provided therein out of the

real estate upon which it is made a charge. In the recent cases of *Lally v. Lally,* 152 Wis. 56, 138 N. W. 651, and *Norris v. Norris,* 162 Wis. 356, 156 N. W. 778, this court reviewed, after elaborate argument and full consideration, the cases in this court dealing with this subject in the light of the provision of sec. 2364, Stats., conferring power on courts to adjudge support and maintenance to a divorced wife and to divide and distribute the husband's estate between them. These adjudications clearly establish that this statute permits of awarding to a divorced wife either alimony or a portion of the husband's estate by transferring to her the title to such portion of his property as the court may find she should receive under all of the facts and circumstances of the case. It is there considered that the statute contemplates that if any provision is made for the benefit of the divorced wife it is to be either an award of alimony or an award of a portion of the husband's estate. See cases cited in the *Lally Case.* Appellant's counsel contend that the provision of the judgment in question rests upon an agreement of the parties and hence is enforceable according to the terms of such agreement if they are embodied in the judgment, upon the same grounds that a valid agreement of parties is enforced in the law, and cite to our attention the following as instances enforcing such relief: *Stratton v. Stratton,* 77 Me. 373; *Storey v. Storey,* 125 Ill. 608, 18 N. E. 329; *Stone v. Bayley,* 75 Wash. 184, 134 Pac. 820. The contracts of the parties in these cases were in writing and the judgments disclose that the courts' decrees are in accordance with and an affirmance of the agreement of the parties. Such is not the fact in the instant case. Neither the findings of fact, conclusions of law, nor the judgment refer to any writing or agreement of the parties. The record of the divorce action, so far as exhibited in this proceeding, presumptively rests wholly on the facts presented before the court as evidence of the facts and circumstances relevant to the hus-

band's estate and the wife's legal and equitable rights thereto. True, some *ex parte* affidavits are offered in this proceeding supporting the contention that the court awarded to the divorced wife support out of the husband's estate pursuant to a verbal agreement between the parties. This cannot now be made the basis of a construction of the terms of the judgment, which are definite and unambiguous in their meaning. An inspection of the terms of the judgment and of the findings of fact and conclusions of law upon which it rests convinces us that the court manifestly intended to accomplish two objects for the wife's benefit, namely, to award to her $25 per month, to be paid in monthly instalments during her lifetime, and to grant her a life estate in the homestead and award her all of the household furniture and furnishings in the home belonging to the parties. The judgment dissolves the bonds of matrimony. It is then adjudged "that the said plaintiff, John H. Steinkopf, pay to said defendant, *Bertha Steinkopf,* or cause to be paid out of his estate, the sum of twenty-five dollars per month, in monthly instalments, on the first day of each month during the term of her natural life as alimony." The payment of this sum is charged as a lien upon a part of the husband's real estate. Another provision of the judgment is "that in addition to such allowance said defendant, *Bertha Steinkopf,* be and she is hereby allowed and awarded the sole use and occupation during the term of her natural life, of the homestead and stable of said plaintiff [describing them]; and that she be and is hereby awarded and allowed the household furniture and furnishings, silverware, pictures, etc., belonging to said parties."

"The statute contemplates that when a wife is given a portion of her husband's estate as a final division of his property, such portion should by the judgment be transferred and set over to her to be and become her separate estate, subject to her control and dominion, and capable of being disposed of by her will or otherwise." If the portion so awarded is in

money it may be made in payments at stated times. "But the number of payments, their time of commencement and termination, must be fixed by the judgment. They cannot rest upon any contingency. . . ." *Lally v. Lally,* 152 Wis. 56, 60, 61, 138 N. W. 651.

It is there further declared (p. 62):

"If it be urged and conceded that a final division of property in the form of monthly payments during life or widowhood is more advantageous to the wife than the receipt of a gross estate at once, the answer is that the statute does not contemplate or permit such a judgment, and no judgment of final division not within the statute can lawfully be made."

Testing the first provision of the judgment in the case before us by these rules, it is plain that the award to pay the divorced wife $25 per month is clearly an award of alimony. The other award in the divorce judgment above quoted is, however, of an entirely different nature, as she is thereby granted an estate in the homestead property during her life, and the household furniture and other personal property therein owned by her husband is absolutely transferred to her. These provisions meet all the calls of a final division and distribution of such estate. They cannot in any sense be regarded as alimony. We have then a judgment of a dual character, from which neither party has appealed to correct the irregularity of the court in dealing with the husband's obligation towards the divorced wife. Upon the whole case we are persuaded that the court intended to award a judgment making a final division and distribution of the husband's estate between the parties, and accomplished that object in so far as the judgment awards the wife a life estate in the homestead property and transfers to her all the described personal property in their home. The provision for a payment by the husband to the wife of $25 monthly during her life is not a division of the husband's estate within the calls of the statute, and hence was an irregularity in the

judgment awarding final division and distribution of his estate. See the *Lally* and *Norris* cases, *supra,* and cases therein cited. Since, however, the husband during his lifetime, and those beneficially interested since his death, have voluntarily paid the sums pursuant to the judgment, we need not further consider the matter. So far as the future is concerned it drops out of the case. The defendant, *Bertha Steinkopf,* is entitled to hold the life estate in the homestead as her separate property in addition to the personal property awarded her. The circuit court erred in divesting the defendant, *Bertha Steinkopf,* of all right, title, and interest in and to the homestead property described in the divorce judgment.

By the Court.—The order appealed from is reversed, and the cause is remanded to the circuit court with direction to enter an order in accordance with this opinion.

STATE EX REL. CITY OF MILWAUKEE, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

February 14—March 13, 1917.

Street railways: Duty to keep track zone "in proper repair:" Paving and repaving: "Reasonable regulations:" Ordinances: Validity: Police power: Impairing obligation of contract: Due process of law: Equal protection of the laws.

1. The duty imposed by a city ordinance upon a street railway company to keep "in proper repair," without qualification, that part of a street which is within the railway zone, is broad enough to require paving and repaving with the same material of which the remainder of the street is composed.
2. A city ordinance directing a street railway company "to do away with the bad condition of its railway zone . . . , by paving the same with standard asphalt upon a concrete foundation, all of the same kind, character, and specifications as that recently

laid by" the city "outside of the railway zone," is a reasonable rule or regulation within the meaning of sec. 1862, Stats., which provides that street railway companies shall be "subject to such reasonable rules and regulations" as the municipal authorities may from time to time prescribe.

3. The power of a city to require a street railway company to repair its railway zone in a street is a police power, legislative and regulative in character, and cannot be contracted away; hence an ordinance changing or enlarging the duty in that respect imposed upon the company by a prior ordinance does not impair the obligation of a contract.

4. An ordinance of that nature, otherwise reasonable, will not be held invalid on the ground that compliance with it would unreasonably reduce the earning capacity of the company below a reasonable return on the investment, since the company can at any time apply to the railroad commission and have the rates of fare made reasonable.

5. Nor does such an ordinance deprive the company of property without due process of law or deny to it the equal protection of the laws, in violation of sec. 1, art. XIV, Amendm. Const. of U. S.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This is an appeal from an order sustaining the demurrer by the respondent to the appellant's amended return to a writ of *mandamus* requiring it to pave Center street from Teutonia avenue to Seventeenth street between the rails and for one foot outside of the rails with asphalt upon a concrete foundation.

The appellant's amended return admitted the corporate capacity of the parties and the business of the appellant; that it operated on Center street under a franchise granted to one of its predecessors and assignors on September 21, 1891, which contained no provision on the subject of paving repairs, as amended by the ordinance of January 2, 1900, which among other things provided that there was given to the *Milwaukee Electric Railway & Light Company,* its successors and assigns, the right to lay, construct, maintain, and operate a single or double track for street railways for carry-

ing passengers, with turnouts, sidetracks, connections, crossovers, and switches, upon conditions named in said ordinance, and which ordinance, among other things, provided:

"It shall be the duty of said railway company at all times to keep in good repair the roadway between the rails and for one foot on the outside of each rail as laid and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs, unless the said railway company and the board of public works of said city shall agree upon some other material, and said company shall then use the material agreed upon."

The amended return alleges that the appellant succeeded to the rights of its assignor under said ordinance of September 21, 1891, prior to January 2, 1900, and on that date was operating on said portion of Center street pursuant thereto; that on January 2, 1900, the ordinance referred to was adopted; that at all times thereafter appellant continued to operate its tracks on said portion of said street; that for several years prior to the filing of the petition all of said portion of said street from curb to curb was composed of macadam; that about August, 1915, the city paved the portion on either side of the track zone with asphalt pavement on a concrete foundation; that on November 8, 1915, the common council passed the pretended ordinance mentioned in the petition; that at the time the writ was issued it had commenced the construction of its tracks on said Center street; that its eastbound track had been wholly removed and about one half of the same reconstructed; that it informed the city that it did not consider said ordinance of any force or effect; that it intended to complete the operation of reducing its track to grade and to put the track zone in good repair with macadam, according to the January 2, 1900, ordinance; that at the time of filing its amended return it had completed the reconstruction of its tracks to grade and had placed said track zone in

good repair with the same material as last used by the city, that being the extent of its duty under the January 2, 1900, ordinance; that at all times after the track zone had been constructed with macadam, except during reconstruction of its tracks, said zone was kept in good repair and condition with macadam.

In its amended return appellant pleads further facts showing that it and the city had from January 2, 1900, until the year 1912 construed the provisions of the ordinance of January 2, 1900, as applying to the various streets and avenues upon which its tracks were being operated and as requiring it to keep the roadway in the track zone in good repair with the same material which had last been used by the city, except where, pursuant to the ordinance, some other material had been agreed upon. It is further alleged in the amended return that appellant complied with all the terms of the September 21, 1891, and January 2, 1900, ordinances and that the latter ordinance became a contract between the state, the city, and appellant; that the pretended ordinance of November 8, 1915, or any ordinance or law attempting to impose upon appellant any greater duty, would be a law impairing the obligation of contracts and deprive appellant of its property without due process of law and be a denial of the equal protection of the law. The amended return further alleges that at the time of the passage of the November 8, 1915, ordinance and prior thereto its earnings from its said railway system in the city were less than an adequate and reasonable return; that the imposition of the additional burden was an unreasonable action on the part of the common council, and that the pretended ordinance was unreasonable and oppressive, and that the common council was without power to pass the same, and that the same is null and void. The return further denies generally the allegations of the petition except as admitted.

For the appellant there was a brief by *Miller, Mack & Fairchild,* and oral argument by *Edwin S. Mack* and *J. G. Hardgrove,* all of Milwaukee.

Clifton Williams, city attorney, for the respondent.

KERWIN, J. The petition of the respondent for a writ of *mandamus* is based mainly upon the ground that the respondent is entitled to have the appellant pave the zone in question with asphalt upon a concrete foundation under the provisions of an ordinance duly passed on the 8th day of November, 1915, by the terms of which the appellant was "ordered and directed to do away with the bad condition of its railway zone on Center street from Teutonia avenue to Seventeenth street, by paving the same with standard asphalt upon a concrete foundation, all of the same kind, character, and specifications as that recently laid by the city of *Milwaukee* outside of the railway zone of the railway company therein."

After refusal of appellant to comply with the said ordinance of November 8, 1915, the alternative writ of *mandamus* was obtained and proceedings had which resulted in the order appealed from.

Counsel for appellant complain of the order below upon the following grounds: (1) That the appellant's rights and duties in respect to paving repairs are fixed by the ordinance of January 2, 1900, under which the duty to keep the track zone in repair is limited to a duty to keep in repair with the material last used by the city in paving the track zone. (2) That the ordinance of November 8, 1915, cannot be sustained as a reasonable rule or regulation under sec. 1862, Stats., because (a) it is not a rule or regulation within the meaning of that section; and (b) if the matters covered thereby might be the subject of a rule or regulation, the ordinance would be unreasonable. (3) The ordinance constitutes a con-

tract limiting the appellant's duty, and the ordinance of November 8, 1915, is void because of the attempted impairment of contract. (4) The enforcement of the November 8, 1915, ordinance or the impairment of the January 2, 1900, ordinance would deprive appellant of property without due process of law and deny it the equal protection of the laws, in violation of sec. 1 of art. XIV of the amendments to the constitution of the United States."

In the so-called Walnut street case (*State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 151 Wis. 520, 139 N. W. 396) the 1900 ordinance was construed, and it was held that such ordinance applied to all streets, but that former ordinances were still in force so far as applicable in addition to the ordinance of 1900.

It is clear from the rulings of this court that a duty to keep "in proper repair," without qualification, is broad enough to require paving and repaving with "the same material of which the street is composed." *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co., supra; Madison v. Southern Wis. R. Co.* 156 Wis. 352, 146 N. W. 492; *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 157 Wis. 121, 147 N. W. 232; *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 157 Wis. 139, 147 N. W. 239.

While counsel for appellant review the foregoing cases and attempt to distinguish them from the instant case, we think they rule the case at bar on all points.

It is strenuously insisted that the ordinance of November 8, 1915, cannot be sustained as a reasonable rule or regulation under sec. 1862, Stats. This contention is also ruled against appellant by the cases in this court above cited, and especially by *Madison v. Southern Wis. R. Co.* 156 Wis. 352, 146 N. W. 492, and *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 157 Wis. 121, 147 N. W. 232. It may also be observed that the January 2, 1900, ordinance adopted by the

city of *Milwaukee* contained in section 3 thereof the following reservation:

"All rights reserved or secured to said city by and under . . . the laws of Wisconsin relating to . . . the use and operation of all cars and tracks and everything connected with the exercise of the rights hereby or hereunder granted . . . are hereby reserved to said city the same as though this ordinance had not been passed, and the same shall extend and apply to all franchises hereby granted except as herein otherwise expressly provided."

In the *Madison Case* (*Madison v. Southern Wis. R. Co.* 156 Wis. 352, 146 N. W. 492) an ordinance of 1892 contained a reservation, "subject to all general provisions of statute law now in force and applicable thereto and to such reasonable rules and regulations respecting such streets and highways . . . as the said council may from time to time enact."

In 1910 the common council of the city of Madison passed an ordinance requiring pavement with asphalt upon a concrete foundation, and the November 8, 1915, ordinance of the city of *Milwaukee,* under which this suit was brought, required asphalt pavement upon a concrete foundation, the old material in each case before the passage of the latter ordinances being macadam. So the case at bar comes squarely within the rule of the *Madison Case* (*Madison v. Southern Wis. R. Co.* 156 Wis. 352, 146 N. W. 492) and the *Milwaukee Case* (*State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 157 Wis. 121, 147 N. W. 232).

The *Madison Case* meets the contention that the requirement of repair is legislative and regulative and not matter of contract. Page 379. The question of repair of streets is fundamentally a police-power proposition and cannot be contracted away. See cases above cited.

It is also argued that paving under the ordinance of November 8, 1915, will unreasonably reduce the earning capacity of the company below a reasonable return on the investment. This contention, even if true, does not reach

the question here, since the company can at any time apply to the railroad commission and have the rate made reasonable.

On the federal questions raised by appellant we have nothing to say further than that we feel satisfied no constitutional provision has been violated. *Madison v. Southern Wis. R. Co.* 156 Wis. 352, 146 N. W. 492; *Southern Wis. R. Co. v. Madison,* 240 U. S. 457, 36 Sup. Ct. 400; *Milwaukee E. R. & L. Co. v. Railroad Comm.* 153 Wis. 592, 142 N. W. 491, affirmed in *Milwaukee E. R. & L. Co. v. Railroad Comm.* 238 U. S. 174, 35 Sup. Ct. 820.

It follows that the order appealed from must be affirmed.

By the Court.—Order affirmed.

WINSLOW, C. J. (*concurring*). I do not think that the *Madison Case* (156 Wis. 352, 146 N. W. 492) has any persuasive bearing on this case, but I concur in the result in this case because I regard the questions here raised as settled adversely to the appellant by the opinion in the case of *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 157 Wis. 121, 147 N. W. 232. Were the questions still open I should vote the other way in accordance with my views as expressed in my dissenting opinion in the last named case.

VINJE, J. I concur in the above opinion of Chief Justice WINSLOW.

KIELAR, Respondent, vs. FRED MILLER BREWING COMPANY, Appellant.

February 14—March 13, 1917.

Master and servant: Injury to servant: Unsafe working place: Assumption of risk: Aggravation of injury: Special verdict: Instructions to jury: Damages.

1. **Where the safe-place statute (secs. 2394—48, 2394—49, Stats.) is applicable, employees do not assume the risks arising from their employer's failure to comply therewith.**

2. In an action for injuries sustained in stepping upon a rusty nail it was not error to refuse to submit to the jury a separate question as to whether the application by plaintiff of plantain leaves to his foot had caused an increase or spreading of the infection, where the court instructed the jury that it was plaintiff's duty to make his injuries as little as possible by exercising ordinary care, and if they found that he failed to exercise such ordinary care by using plantain leaves and that thereby his injuries were increased they should omit and exclude from the damages such injuries as resulted from the use of plantain leaves.
3. Where an employee thirty-three years old and earning $4 per day was injured by stepping on a rusty nail and as a result was subjected to six operations, lost two toes and a part of the foot, could not stand on his foot or use it, suffered great pain at all times, and had paid $1,136.35 for surgical attendance and hospital bills up to the time of trial, an award of $7,500 was not excessive.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action for damages for personal injuries. The complaint alleges that plaintiff was employed by the defendant as a carpenter for some years prior to August 15, 1913; that among other things it was his duty to repair ice boxes, and that on August 15, 1913, the foreman of the carpenter shop directed plaintiff and another to repair an ice box which was in several sections and to put it together in another part of the room; that each of the sections weighed about 300 pounds and that it required two men to carry them to the place designated by the foreman; that the portion of the floor of the carpenter shop over which it was necessary for plaintiff to walk was covered with numerous short boards and strips of wood from which there projected a great number of rusty nails; that said boards and nails were permitted by the defendant to remain on said portion of the floor for many days, by reason of which the floor was in an unsafe and dangerous condition; that while carrying a section of the ice box from one place to another plaintiff was obliged to lean his head to one side in such a manner that his view of the floor was ob-

structed, as a result of which he stepped upon a rusty nail and sustained a severe injury to his left foot. The complaint then charged the defendant with negligence by reason of its failure to keep the floor in a safe condition and alleged that such negligence was the proximate cause of plaintiff's injury. The answer put in issue all the material allegations of the complaint and alleged that the injury was wholly caused by plaintiff's own negligence.

By its answers to questions submitted on a special verdict the jury found (1) that at the time of the injury the place where plaintiff was injured was not as free from danger to employees as the nature of the employment would reasonably permit; (2) that the fact that said place was not as free from danger to employees as the nature of the employment would reasonably permit was the proximate cause of plaintiff's injury; (3) that no want of ordinary care on the part of the plaintiff proximately contributed to produce his injury; (4) that plaintiff did not assume the risk of injury; and (5) that $7,500 would reasonably compensate plaintiff for the injuries sustained.

From a judgment entered in accordance with such verdict defendant appeals.

For the appellant there were briefs by *Doe, Ballhorn & Doe* of Milwaukee, and oral argument by *Joseph B. Doe.*

For the respondent there was a brief by *Churchill, Bennett & Churchill* and *F. X. Swietlik,* all of Milwaukee, and oral argument by *W. H. Churchill.*

ROSENBERRY, J. The defendant strenuously urges that "the evidence clearly shows that the danger of stepping on nails in this particular shop was incident to the service which plaintiff was performing; that he knew and appreciated the danger; that he knew the floor had boards or strips on it; and that such boards and strips usually had nails in them; that old boards and strips were around and that nails

were always left in them, and that in the particular place over which he walked several times without injury there were old strips, presumably with nails in them, which had been there three weeks to his knowledge," and that upon such facts it must be held that plaintiff assumed the risk as a matter of law, citing a large number of cases, beginning with *Paule v. Florence M. Co.* 80 Wis. 350, 50 N. W. 189, and ending with *Massy v. Milwaukee E. R. & L. Co.* 143 Wis. 220, 126 N. W. 544.

It may be admitted that upon the facts shown by the undisputed evidence in this case and under authorities cited the plaintiff assumed the risk. But from that it does not necessarily follow that under the law as it stands today plaintiff assumed the risk. Since the last of these cases was decided the so-called safe-place statute has been enacted (secs. 2394—48 and 2394—49, Stats. 1915). If the enactment of this statute casts upon the employer no greater burden than theretofore existed in respect to furnishing a safe place for his employees to work, then the doctrine of assumption of risk as set out in *Paule v. Florence M. Co., supra,* and other cases cited, might apply.

The employer in this case had elected to come under the Workmen's Compensation Act. The accident occurred August 15, 1913, and at that time the plaintiff, the employee, had not elected to come under the act; so that by the terms of the law as it stood at the time of the happening of the accident the defenses of assumption of risk, negligence of a fellow-servant, and contributory negligence were available to the defendant. However, the defendant was not excepted from the provisions of secs. 2394—48 and 2394—49, Stats., and therefore the rights of the parties must be determined with reference to the safe-place statute. In *Rosholt v. Worden-Allen Co.* 155 Wis. 168, 144 N. W. 650, this court held that the duty imposed by the safe-place statute is as mandatory and as absolute as that imposed by ch. 396 of the Laws

of 1911 (sec. 1636*jj*, Stats. 1913). In *Janiak v. Milwaukee Western F. Co.* 156 Wis. 544, 146 N. W. 788, it was held that sec. 1636*jj*, Stats., abolished assumption of risk in cases where it is applicable. In *Besnys v. Herman Zohrlaut L. Co.* 157 Wis. 203, 213, 214, 147 N. W. 37, this court, having under consideration secs. 2394—48 and 2394—49, speaking of the facts of that case, said:

"Was the danger and hazard to which the plaintiff was subjected at the time of the injury one created by him through his negligent acts, or was the danger and hazard one incident to the method and process of conducting this business? In answering this question the purpose of the enactments must be consulted. It is manifest from their context that the legislature intended that employers should be liable for all injuries resulting to employees from unsafety in employment as regards to places, safety devices, and safeguards, and to methods and processes of conducting their business. The clear implications are that the risks and hazards of an employment resulting from the failure of the master to comply with these requirements are risks and hazards incident to the employee's duties, though they may be of an obvious nature. . . . We are led to the conclusion that the legislative purpose expressed by these enactments is that the consequent injuries from all hazards, risks, and dangers incident to the method, process, and conditions of the business furnished, permitted, or suffered by an employer, however obvious and open the hazards, risks, and dangers may be to the employee, are to be borne by the employer, and shall not defeat a recovery of damages for an injury to an employee engaged in the line of his duty or for death resulting from such an injury."

The jury having found that the employer had not performed its statutory duty and that such failure was the proximate cause of plaintiff's injuries, the risk was clearly one not assumed by the plaintiff. To hold that an employer may fail in the performance of the duty imposed upon him by the statute and that an employee assumes the risk of injury therefrom would emasculate the statute. Where the safe-

place statute applies, the employer must comply with the law, and his employees do not assume the risks arising from his failure to do so.

Upon sufficient evidence to sustain its verdict the jury found that plaintiff was not guilty of contributory negligence.

It was claimed by the defendant that some time after the injury plaintiff applied plantain leaves to his foot and thereby caused an increase or spreading of the infection already in the wound, and the defendant asked that the court submit to the jury a question embodying this claim. This the court declined to do and error is assigned thereon. In submitting the case the court carefully instructed the jury that it was the duty of the plaintiff to make his injuries as little as possible by exercising ordinary care, and if they found that plaintiff failed to exercise such ordinary care by using plantain leaves and that thereby his injuries were increased they should omit and exclude from the damages such injury as resulted from the use of plantain leaves. We think the instruction given was correct and that the refusal of the court to submit the question requested by the defendant was not error.

The jury assessed plaintiff's damages at $7,500. It is claimed they are excessive. It appears that plaintiff had expended $1,136.35 for surgical attendance and hospital bills up to the time of the trial; he was thirty-three years of age and was earning $4 a day at the time of the accident; he was subjected to six operations, two of his toes and part of his foot being removed; he cannot stand on his foot or use it; and he testified that he suffered great pain at all times. Under these circumstances we cannot say that the verdict is excessive.

By the Court.—Judgment affirmed.

STATE EX REL. LANGEN, Appellant, vs. BODDEN, Tax Commissioner, Respondent.

February 15—March 13, 1917.

Officers: City civil service: Removal for cause: Mistake: Remedies.

1. Where the tax commissioner of the city of Milwaukee in good faith removes a subordinate for cause pursuant to sec. 4, ch. 313, Laws 1895, as amended by ch. 547, Laws 1911, even though he may have been mistaken as to the existence of the cause assigned, the remedy given by said section by way of making answer and being heard in the matter is exclusive, and reinstatement will not be compelled by *mandamus* or other judicial proceeding.
2. The discharge by such tax commissioner of a ward assessor on the ground that he had been convicted and fined by the district court for being drunk and disorderly is within the rule above stated, even though such conviction was afterwards set aside on appeal.

APPEAL from an order of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

This is a petition for a writ of *certiorari* to review the action of the defendant in discharging the relator from the office of ward assessor and praying that this court reverse and set aside such action of the tax commissioner. The petition also asks that judgment be entered for relator in the sum of $1,392 and for his costs and disbursements.

On the 13th of January, 1915, the relator, before he or his attorney appeared in district court, was convicted of having been drunk and disorderly and was fined $5 and costs. On January 14, 1915, the defendant requested the resignation of the relator as the assessor for the Twelfth ward of the city of Milwaukee, which office he had held for several years. The relator informed the commissioner that an appeal would be taken from the conviction of the district court. The relator was, however, discharged from service by the defend-

ant and the cause assigned by the defendant in his report to the board of city service commissioners was that the relator had "been found guilty and fined by the district court of Milwaukee county for being drunk and disorderly." On January 22, 1915, the relator filed notice of an appeal in the action against him to the municipal court. On the following February 16th the case was dismissed and the relator discharged. On February 23, 1915, the relator filed with the board of city service commissioners an answer to this discharge, alleging the conviction had been set aside by the municipal court. He also alleged that he was neither drunk nor disorderly and that the assigned cause does not constitute sufficient ground for discharge as a matter of law. A hearing was held on the matter, and at the close of the hearing a motion was made to reinstate relator in his position, which motion was denied by the commissioners. On July 29, 1916, petition for a writ of *certiorari* was filed, allowed, and issued. On the 16th day of August the relator was served with an order to show cause why the writ should not be superseded, vacated, and set aside and the action dismissed. All proceedings were ordered to be stayed until September 9th. On December 2, 1916, an order was made by the circuit court granting defendant's motion to supersede, vacate, and set aside the writ and dismissing the proceeding. This is an appeal from such order.

A. J. Buscheck of Milwaukee, for the appellant.

For the respondent there was a brief by *Clifton Williams,* city attorney, and *Garfield S. Canright,* assistant city attorney, and oral argument by *Mr. Canright.*

SIEBECKER, J. It appears from the petition that the tax commissioner removed the relator from office on the ground that relator had been "found guilty and fined by the district court of Milwaukee county for being drunk and disorderly." It is undisputed that such conviction was had in the district

court and formed the basis of the tax commissioner's action in the matter. In the light of these facts the relator in this proceeding has no standing in court. It was held in *State ex rel. Hayden v. Arnold,* 151 Wis. 19, 138 N. W. 78, that a tax commissioner of the city of Milwaukee is the head of a principal department of the city government and has the power to remove ward assessors from office pursuant to the provisions of ch. 313, Laws 1895, as amended by ch. 547, Laws 1911. And in *State ex rel. Bannen v. Arnold,* 151 Wis. 38, 138 N. W. 85, it was determined that if a tax commissioner in good faith removes a subordinate for cause pursuant to sec. 4 of such statute, even though he "may have been mistaken as to the existence of the cause assigned, the remedy given by said section by way of making answer and being heard in the matter is exclusive, and reinstatement will not be compelled by *mandamus* or other judicial proceeding" (headnote).

We are of the opinion that the instant case is within the rule of these decisions and that the petition states no cause for judicial relief.

By the Court.—The order appealed from is affirmed.

DRISCOLL, Appellant, vs. TILLMAN, imp., Respondent.

February 16—March 13, 1917.

Appearance, general or special? Petition to vacate judgment for lack of jurisdiction: Immaterial allegations: Laches.

1. **Whether the appearance of a party for the purpose of making a motion in an action is a general or a special appearance does not necessarily depend upon the designation given it, but is to be determined, in case of doubt or dispute, from the nature and object of the appearance and the issues necessarily raised and litigated thereby.**
2. **If an appearance is for the sole purpose of moving to vacate an order or judgment for lack of jurisdiction because of no service of process on the appearing party, the appearance is special,**

whether so designated or not; but if he asks for relief which can be granted only by a court having jurisdiction of his person, the appearance will be held to be general though denominated as special.

3. Where a party appeared for the sole purpose of having a judgment vacated so far as it affected his property on the ground that he was not served in the action, immaterial allegations in his petition showing how he was damaged thereby should not be held to make his appearance a general one, especially where the issue claimed to be raised by such immaterial allegations was not litigated and did not enter into the court's disposition of the case.
4. Where a party asking that a judgment obtained against him without jurisdiction of his person be set aside stands purely on his legal right, mere delay or acquiescence after discovery of the existence of the judgment will not bar the remedy unless it continued so long as to defeat the right itself.
5. A petition in the action in which the judgment was rendered is a proper remedy in such a case.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

September 25, 1909, a deficiency judgment was entered against the defendant *Clemens W. Tillman* in this action foreclosing a mortgage on land previously conveyed to him by a deed reciting that he assumed and agreed to pay the mortgage. The defendant *Tillman* was not served with either summons or complaint and made no appearance. Sometime in March, 1912, he first learned of the existence of the deficiency judgment, and on February 10, 1916, he obtained an order to show cause why the deficiency judgment should be held to be a lien upon lands owned by him and not embraced in the foreclosure action. The amended petition for the order alleged that the mortgaged premises were sold at the foreclosure sale for an inadequate price and that had the petitioner known of the sale he could have protected himself.

The circuit court found that no service of the summons and complaint was made upon *Clemens W. Tillman;* and

that he was not guilty of such laches as to bar him from the relief asked. It held that he had made no general appearance in the action; and ordered the deficiency judgment to be set aside as to him and declared it to be no lien upon any premises owned by him. From such order the plaintiff appealed.

For the appellant there was a brief by *Pereles, Strouse & Carter* of Milwaukee, and oral argument by *Alex. M. Strouse.*

Oscar W. Kreutzer, attorney, and *James D. Shaw,* of counsel, both of Milwaukee, for the respondent.

VINJE, J. The fact that no service was made on the petitioner is clearly shown by the proof and such finding is not questioned by the plaintiff. But he claims that the petitioner made a general appearance in the action when he came in and asked for the relief demanded in the petition as amended, based upon the allegations thereof to the effect that the mortgaged premises were sold for an inadequate price and that had petitioner known of the sale he could have protected himself. The answer did not admit these allegations and it contained a general denial, so the pleadings technically made the inadequacy of the price an issue. But no evidence was taken on the subject and no findings of the court made with reference thereto. The petitioner claims that the only purpose of the allegations as to the inadequacy of price was to allege damage to him by reason of the failure to serve him. Such allegations were needless, because if the judgment was entered against him without jurisdiction damage would be presumed from such wrongful entry and he would be entitled to have it set aside as to him. Since the petitioner appeared for the sole purpose of having the judgment vacated so far as it affected his property on the ground that he was not served in the action, it must be deemed that immaterial allegations showing how he was damaged thereby should not be held to constitute a general appearance, and especially so where the

issue claimed to be raised by such immaterial allegations was not litigated and did not enter into the trial court's disposition of the case.

While it is true petitioner does not state that he makes a special appearance, that fact does not make the appearance general. The effect of the appearance cannot be controlled by the designation given it by the appearing party. In each case of doubt or dispute the court will look at the nature and object of the appearance and the issues necessarily raised and litigated thereby, and from such inspection determine whether the appearance is general or special. If the appearance is for the sole purpose of vacating an order or judgment for lack of jurisdiction because of no service of process on the party appearing, then the appearance is special whether so designated or not. *Blackburn v. Sweet,* 38 Wis. 578; *Sanderson v. Ohio Cent. R. & C. Co.* 61 Wis. 609, 21 N. W. 818; *Kingsley v. G. N. R. Co.* 91 Wis. 380, 64 N. W. 1036; *Bestor v. Inter-County Fair,* 135 Wis. 339, 115 N. W. 809. The case of *Spencer v. Osberg,* 152 Wis. 399, 140 N. W. 67, may seem to conflict with this statement. In that case, however, the motion to vacate the judgment did not state that it was because of lack of service on the moving party. There was merely a general motion to vacate the judgment without stating upon what ground. This fact was inadvertently omitted from a statement of the case. For that reason, and because the proof in fact showed service, the trial court denied the motion and this court sustained its action. On the other hand, if the moving party asks for any relief that can be granted only by a court having jurisdiction, then the appearance will be held to be general though denominated as special. *Grantier v. Rosecrance,* 27 Wis. 488; *Anderson v. Coburn,* 27 Wis. 558; *Alderson v. White,* 32 Wis. 308; *Bestor v. Inter-County Fair,* 135 Wis. 339, 115 N. W. 809; *State ex rel. Engle v. Hilgendorf,* 136 Wis. 21, 116 N. W.

848; *Rix v. Sprague C. M. Co.* 157 Wis. 572, 147 N. W. 1001.

The circuit court properly held that the petitioner was not guilty of such laches as to bar him from the relief asked. It is true he waited about four years after he discovered the existence of the judgment and until the statutes of limitation barred plaintiff's remedy against him personally before he applied to the court for relief. But he does not ask for relief on equitable grounds. If he did, another question would be presented. He stands purely on his legal right to have a judgment obtained against him without jurisdiction of his person set aside. In such cases mere delay or acquiescence will not bar the remedy unless it has continued so long as to defeat the right itself. 5 Pom. Eq. Jur. (1 Eq. Rem.) § 24 and cases cited; *Pollard v. Wegener,* 13 Wis. 569; *Godfrey v. Wright,* 151 Wis. 372, 139 N. W. 193. The cases of *Russell v. Fish,* 149 Wis. 122, 135 N. W. 531; *Langlade R. Co. v. Magee,* 156 Wis. 457, 145 N. W. 1101; and *Bur v. Bong,* 159 Wis. 498, 150 N. W. 431, cited and relied upon by plaintiff's counsel, related to the granting of relief on equitable grounds, and hence are not applicable to the case at bar.

That a petition in the original action is a proper remedy was ruled in *Stein v. Benedict,* 83 Wis. 603, 53 N. W. 891, and in *Jackson M. Co. v. Scott,* 130 Wis. 267, 110 N. W. 184. No other claims of error are of sufficient merit to justify treatment in an opinion.

By the Court.—Order affirmed.

YATES vs. YATES: PETITION OF MILLER, Guardian *ad litem*. YATES, Appellant, vs. MILLER, Respondent.

February 16—March 13, 1917.

Guardian ad litem: Compensation from fund in control of court: Divorce: Allowances: Revision of judgment: Death of wife: Termination of trust agreement.

1. In the absence of special legislative authority, no compensation can be allowed to an unsuccessful guardian *ad litem*, payable out of the fund under the control of the court, in excess of taxable costs or a sum in the nature thereof as taxed between party and party.
2. A judgment can be revised or altered under sec. 2369, Stats., only when the petition is made by a party for revision or alteration in some of the matters enumerated in said section.
3. An allowance for alimony having come to an end by the death of the divorced wife, and the right to care and custody of a child having been restored to the father, the divorce judgment was, in a special proceeding, so modified as to terminate a trust agreement, made a part of such judgment, under which a fund had been placed in trust to provide for said alimony and the support of the child. *Held*, that when the divorce judgment was so modified it was no longer a judgment for alimony or other allowance for wife or child or for the appointment of a trustee, and the court could not thereafter, upon petition of the guardian *ad litem*, who had acted for the child in the special proceeding, make the termination of the trust contingent upon the payment of compensation to such guardian.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

The original action was brought by the plaintiff to secure a divorce. An interlocutory judgment of divorce had been entered in the action February 13, 1911. Prior thereto plaintiff and defendant had entered into an agreement by which they had settled their property rights, and by the terms of this agreement $40,000 was placed in trust for the benefit of the plaintiff, who was to receive the income there-

from during her life and upon her death the same was to be paid to the minor child of the parties, with certain reservations not here material. The agreement was embodied in the judgment. Within a few months after the entry of the interlocutory judgment the plaintiff died, leaving the minor child surviving, entitled, according to the terms of the trust agreement, to receive the income. Thereupon the defendant, by a special proceeding in the divorce action, sought a modification of the judgment. In such proceeding the judgment was modified and the defendant was restored to the unqualified title to the property held under the trust agreement and the custody of the child was awarded to the defendant. There was an appeal from the judgment in the special proceeding (see *Yates v. Yates,* 157 Wis. 219, 147 N. W. 60). The petitioner, *George P. Miller,* was guardian *ad litem* of the minor child in the proceeding brought by the defendant to modify the original judgment and represented her upon the trial and in this court upon appeal. The *remittitur* from this court was filed with the clerk of the trial court August 24, 1914. This is an application by the guardian *ad litem* to fix the value of the services rendered upon the appeals and in the court below, begun by petition at the foot of the judgment in the special proceeding June 18, 1915. In his petition the guardian *ad litem,* after setting out certain preliminary matter, alleges:

"That in the trial of said proceeding upon petition of *Arthur W. Yates,* and in the prosecution of said appeal to the supreme court of Wisconsin, said *George P. Miller* as guardian *ad litem* of said Georgia Marion Yates, a minor, and as attorney for said trustee, performed and caused to be performed a considerable amount of work and labor and rendered legal services, in the investigation of the facts preparatory to the trial, in the examination of witnesses upon the trial, in the investigation of the law, in the making of oral arguments in this court and in the said supreme court, in the preparation of written briefs filed in this court, and in

the preparation of a printed case and a printed brief filed in said supreme court; that said work and labor and said services as such attorney and guardian *ad litem* are reasonably worth the sum of one thousand dollars ($1,000); that he as such guardian *ad litem* or as attorney for said trustee has received no compensation whatever for the same; that said trustee has in its possession as such trustee the property which came into the possession of said trustee under such trust."

The guardian *ad litem* asked for an order modifying the judgment theretofore made by the circuit court by inserting therein a provision requiring that there should be paid to the petitioner out of the property described in the trust agreement sums aggregating $1,178.30 and for general relief. The defendant in the original action, the appellant here, answered the petition of the guardian *ad litem,* alleged that the appeals were fruitless, that he was not under any obligation to pay the petitioner fees as guardian *ad litem* beyond the taxable costs and disbursements, that he had offered to pay the guardian *ad litem* fair compensation, which the guardian *ad litem* refused, taking the position that he preferred to have the entire matter settled by the court; that thereupon appellant elected to stand upon his legal rights and denies that he is under any obligation to said guardian *ad litem* beyond the judgment for costs. There was a trial before the court upon the petition and answer. The court found that the services of the guardian *ad litem* were reasonably worth the sum of $650; that the services were necessary; that they inured to the benefit of the minor; that the guardian *ad litem* had necessary disbursements amounting to $178.30, and other facts were found not necessary to be stated here, and judgment was entered as follows:

"And it is further ordered, adjudged, and decreed that the revocation and cancellation of the trust agreement and trust conveyance dated February 6, 1911, and executed by *Arthur W. Yates* and First Savings & Trust Company and the accounting of the said First Savings & Trust Company to said

Arthur W. Yates for the property described in such trust agreement and conveyance which was ordered, adjudged, and decreed in and by said order, judgment, and decree of November 22, 1913, shall be conditioned on the payment of said sum of six hundred fifty dollars ($650) by said *Arthur W. Yates* to *George P. Miller,* and said payment shall be made before said cancellation and revocation shall become effective and before said accounting shall be made."

From the judgment entered this appeal is taken by the defendant, *Yates.*

For the appellant there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *F. L. McNamara,* all of Milwaukee.

Stephen J. McMahon of Milwaukee, for the respondent.

ROSENBERRY, J. It is conceded that under the general rule laid down in *Will of McNaughton,* 138 Wis. 179, 118 N. W. 997, 120 N. W. 288, no compensation can be allowed to an unsuccessful guardian *ad litem* payable out of the fund under control of the court in excess of taxable costs or a sum in the nature thereof as taxed between party and party, in the absence of special legislative authority. It is contended, however, that special legislative authority exists in the present case by virtue of the following statute:

"Section 2369. After a judgment providing for alimony or other allowance for the wife and children, or either of them, or for the appointment of trustees as aforesaid the court may, from time to time, on the petition of either of the parties, revise and alter such judgment respecting the amount of such alimony or allowance and the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, and may make any judgment respecting any of the said matters which such court might have made in the original action. . . ."

By the death of the wife the allowance for alimony was at an end, as alimony continues only during the joint lives of the parties. *Maxwell v. Sawyer,* 90 Wis. 352, 63 N. W. 283. By the death of the mother the right of the father over

the child was restored and he was legally bound to provide for all her wants, and he was entitled under the facts and circumstances shown in this case to her care and custody. *Taylor v. Jeter,* 33 Ga. 195; *Bryan v. Lyon,* 104 Ind. 227, 3 N. E. 880; 9 Ruling Case Law, 479; *Clarke v. Lyon,* 82 Neb. 625, 118 N. W. 472, 20 L. R. A. N. S. 171 and note; *Barnes v. Long,* 54 Oreg. 548, 104 Pac. 296, 25 L. R. A. N. S. 172; *Wilson v. Mitchell,* 48 Colo. 454, 111 Pac. 21, 30 L. R. A. N. S. 507. Therefore, when the interlocutory judgment was modified by the judgment in the special proceeding had upon the petition of the defendant, it was no longer a judgment for alimony or other allowance for wife or child or for the appointment of a trustee. The action was terminated and the whole matter set at rest.

While in a proper case the court may, upon petition made in accordance with the statute, make any judgment in the matter which it might have made in the original action, the judgment can be revised or altered only when the petition is made by a party for revision or alteration in the respects enumerated in the statute. The petition in this case is not made by a party, and it is not one to revise or alter the judgment respecting the amount of alimony or the allowance and payment thereof, or respecting the appropriation and payment of principal and income of the property held in trust for the benefit of the wife and child. The petition here is a petition to fix the compensation of a guardian *ad litem* and to make the operation of the judgment in the special proceeding by which the trust was terminated contingent upon the payment of any sum found to be due to the guardian *ad litem.* This clearly is not within the terms of the statute. Therefore the statutory authority required under the decision in the *McNaughton Will Case* does not exist and the petition must be dismissed.

By the Court.—Judgment reversed, with directions to dismiss the petition.

CASPER CONE COMPANY and another, Appellants, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

February 16—March 13, 1917.

Workmen's compensation: Conditions of liability: When injury is accidental: Hernia resulting from strain: Predisposition.

1. A hernia resulting from accidental straining of a muscle is "proximately caused by accident," within the meaning of sub. (3), sec. 2394—3, Stats., even though the employee was predisposed to such infirmity by reason of having a congenital hernial sac.
2. A definite mishap to an employee, happening to him while performing service growing out of and incidental to his employment and proximately causing him physical injury and damaging results, is compensable under the Workmen's Compensation Act, even though he was physically unsound at the time and otherwise the results would not have been caused by the mishap.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from a judgment affirming an award of compensation to *Felix Martinek* under the Workmen's Compensation Act.

The evidence established this: At the time of the injury, the claimant was an employee of appellant, *Casper Cone Company.* Both were under the Workmen's Compensation Act. While in the due performance of his duties, he accidentally slipped and so strained himself that he fell to the floor, causing a right inguinal hernia with resulting serious disability. He was predisposed to such an infirmity by reason of having what was called a congenital hernial sac. It had previously been undiscovered and undiscoverable, and had never caused him any inconvenience. There was no hernia until a protrusion occurred through the inguinal ring and muscles, caused by the accident. Without a strain or disturbance of some sort, the sac might never have led to any disablement. In the absence of some such disturbing cause

it is quite common for a person to go through life with a sac, such as existed in the particular instance, without his experiencing any inconvenience from it. The claimant had performed manual labor for many years without being conscious of any predisposition to hernia.

The cause was submitted for the appellants on the brief of *Roehr & Steinmetz* of Milwaukee, for the respondent *Industrial Commission* on that of the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and for the respondent *Martinek* on that of *Lines, Spooner, Ellis & Quarles* of Milwaukee.

MARSHALL, J. The question presented for decision is, Did the circuit court decide rightly in holding that the injury to the claimant, *Martinek,* was proximately caused by accident within the meaning of sub. (3), sec. 2394—3, Stats.?

As indicated in the statement, *Martinek* did not suffer from any disability because of merely having a congenital hernial sac. The accident caused the hernia and consequent disability. That a hernia caused by accident to an employee when he is performing service, growing out of and incidental to his employment, is a compensable injury under the Workmen's Compensation Act, is fully covered by the logic of *Bystrom Brothers v. Jacobson,* 162 Wis. 180, 155 N. W. 919. The court there quoted with approval from *Fenton v. Thorley,* 89 L. T. Rep. 314, this: "If a man, in lifting a weight, or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap, in ordinary parlance, would be described as accidental;" and concluded the discussion by saying: "accident" when used in workmen's compensation laws "should be taken in the broad sense above indicated,—as including a violent straining of the muscles, resulting in a rupture or other bodily hurt to an employee from over-physical exertion in performing his work." Many cases were there referred to, holding that an

accidental straining of a muscle causing the development of a hernia is a compensable accidental injury under compensation laws similar to ours, and it is considered that such is the settled law. Indeed, it may well be said to rest on principle without referring to precedents. *Robbins v. Original G. E. Co.* (Mich.) 157 N. W. 437, upon which the court below largely relied, is about as near like this case as any two cases arising out of different circumstances could well be.

Counsel for appellants contend that because of *Martinek* having been, at the time of the accident, predisposed to the development of a hernia by any undue straining of his muscles in the region where the protrusion occurred, the result of his mishap is precluded from being a compensable injury.

But for the mishap there would not have been any disability, caused at the particular time, and such a disability might never have occurred. In the *Robbins Case* the Michigan court, as claimed by respondents' counsel, in dealing with a similar situation, said:

"It is assumed that it was the first time the sac had been forced through the abdominal wall. If it is also assumed that there was a certain lack of physical integrity in the parts where the injury was manifested, still I think claimant may have compensation for the injury he suffered."

The decision of this court in *Milwaukee v. Industrial Comm.* 160 Wis. 238, 151 N. W. 247, is sufficient to settle the question in favor of respondents of whether predisposition to such a result as happened from the particular mishap necessarily militates against the hernia being the proximate result of accident within the meaning of the Workmen's Compensation Law. To the same effect are *Crouse v. C. & N. W. R. Co.* 104 Wis. 473, 483, 80 N. W. 752; Boyd, Workmen's Compensation, § 463; Dawbarn, Employers' Liability (4th ed.) 107, and many other authorities that might be referred to.

To go on at considerable length and review the many au-

thorities at hand might be interesting, but enough has been said to show that the conclusion reached is too well grounded to fairly admit of its soundness being efficiently questioned. An extended treatment of the matter can do no good here, or hereafter. It seems best to rest the case by a declaration that, if there is a definite mishap to an employee, happening to him while performing service growing out of and incidental to his employment, proximately causing him physical injury and damaging results, the misfortune is compensable under the Workmen's Compensation Law, though he was physically unsound at the time of such mishap and otherwise such results would not have been caused by such mishap. It is considered that the decision complained of is right and should be affirmed.

By the Court.—The judgment is affirmed.

STATE EX REL. OWEN, Attorney General, Respondent, vs. REISEN, Appellant.

SAME, Respondent, vs. O'NEILL, Appellant.

SAME, Respondent, vs. CONWAY, Appellant.

February 16—March 13, 1917.

Intoxicating liquors: Licenses: Limitation of number after no-license period: Invalidity: Public nuisance: Injunction.

1. The saving clause or proviso in sec. 1565*d*, Stats. 1915,—protecting existing licenses equal in number to those in force at a certain date,—is inoperative after a no-license period.
2. The saving clause in sec. 1565*dd*, Stats. 1915 (Laws 1915, ch. 453, sec. 2), is not applicable where, by reason of an injunction, a village board could not and did not fulfil the conditions of that clause by granting licenses within thirty days from the passage of said ch. 453.
3. Where neither of the saving clauses above mentioned was operative, but one license could be granted in 1916 in a village having less than 500 inhabitants.
4. Where a village board, having power to grant but one license, granted three in a single motion, all must be held illegal because

it cannot be said that any one of them was granted before the others.

5. Whenever any place is used for the unlawful sale of liquor, an action under sec. 3180*a*, Stats. 1915, to enjoin it as a public nuisance may be maintained, although there has been no criminal conviction of the keeper of the place.

APPEALS from judgments of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

These are actions in equity brought on behalf of the state under the provisions of sec. 3180*a*, Stats. 1915, to enjoin the maintenance of certain saloons in the village of Ridgeway because not legally licensed and hence public nuisances under sec. 1563, Stats. 1915.

The actions have already been in this court on appeals from judgments of the county court of Iowa county, and it was held that such court did not have jurisdiction of them, and the records were remanded with directions to certify them to the circuit court for Iowa county for further proceedings. 164 Wis. 123, 127, 159 N. W. 747, 749. An affidavit of prejudice against the circuit judge being on file in each case, the cases were sent by the circuit court for Iowa county to the circuit court for Dane county for trial. The material facts were not disputed and were alike in all the cases.

The village of Ridgeway had a population of 358 by the state census of 1905 and of 437 by the federal census of 1910. It had several licensed saloons up to the license year beginning July 1, 1913, during which year no license was granted because at the election in April, 1913, the voters had voted for no license. At the election in April, 1914, there was a majority for license, and the village board on June 30th of that year granted licenses to *O'Neill, Conway,* and one Zurfleuch for the ensuing year. At the election in April, 1915, the election officials returned a majority for license, but an action was brought prior to July 1, 1915, in behalf of the state, charging fraud in the election and asking that the

village board be enjoined from granting any license. A temporary injunction was granted restraining the board from granting any license *pendente lite,* and this order was in force until December 31, 1916, when the action was dismissed. No licenses were granted for the license year beginning July 1, 1915, on account of this temporary injunction. At the election in April, 1916, there was a majority for license, and on June 29, 1916, at a meeting of the village board, a motion was made and carried that licenses be granted to the three defendants (all being named in the same motion) for locations which had been occupied as saloons under the licenses granted for the license year 1912–13.

July 29, 1915, ch. 453, Laws 1915, went into effect, amending sec. 1565*d,* Stats., by changing the ratio of saloons to inhabitants from one for each 250 to one for each 500. This act also contained a new provision, familiarly known as the Stemper amendment (sec. 1565*dd,* Stats.), providing as follows:

"Any town, village or city in this state wherein during the year ending June 30, 1913, licenses had been granted to persons for locations for the sale of strong, spirituous, malt, ardent or intoxicating liquors in violation of the provisions of section 1565*d,* may within thirty days from the passage and publication of this act grant licenses to any person qualified under the provisions of sections 1548 and 1565*l* for any such location, provided that if the granting of such license for such location will increase the total number of licensed locations in any such municipality over the number in existence June 30, 1915, and also over the ratio of one for each five hundred inhabitants, or fraction thereof, some other location in such municipality shall be abandoned or discontinued or license refused therefor and any location substituted, reinstated or licensed under the provisions hereof shall thereafter be subject to the provisions of section 1565*d.* And provided further that in all cities the chief of police shall first file with the city clerk in writing consent to or approve of the location to be reinstated and granted license and also consent

to or approve of the location to be abandoned or discontinued."

No attempt was made by the village board to act under the provisions of this last named law.

The circuit court held that the board could legally grant but one license and that none of the licenses in form granted to the defendants June 29, 1916, were valid; that judgment should be entered in each case abating the saloon as a nuisance unless within five days the village board chose to grant a license to one of the defendants, in which case the action against such defendant should be dismissed. No action being taken by the village board within the prescribed time, judgment for the plaintiff was entered in each case and appeals were taken.

For the appellants the cause was submitted on the brief of *McGeever & McGeever* of Dodgeville and *Platt Whitman* of Highland.

For the respondent there was a brief by *Crownhart & Wylie* of Madison and *Fiedler & Fiedler* of Mineral Point, and oral argument by *E. C. Fiedler* and *F. M. Wylie.*

WINSLOW, C. J. These judgments must be affirmed because (1) the fact that no licenses were granted in the license year 1913–14 prevented the operation of the saving clause in sec. 1565*d*, Stats. 1915 (*State ex rel. Owen v. Schotten, ante*, p. 88, 160 N. W. 1066); (2) the saving clause in sec. 1565*dd* does not apply, because the village board could not and did not fulfil its conditions by granting licenses within thirty days after its passage, the injunction against granting licenses being in operation at the time the act was passed and for more than thirty days thereafter; (3) only one license could be legally granted in 1916 under the provisions of 1565*d*, Stats., because the village had less than 500 inhabitants; (4) three licenses being granted in a single motion,

all must be held illegal, because it is impossible to say that any one of them was granted before the others; (5) the remedy by action in equity to enjoin a public nuisance may be invoked although there has been no criminal conviction of the keeper of the place. *State ex rel. Att'y Gen. v. Stoughton Club,* 163 Wis. 362, 158 N. W. 93.

By the Court.—Judgment affirmed in each case.

CULLITON, Respondent, vs. BENTLEY and others, Appellants.

February 16—March 13, 1917.

Taxation: Assessment not in "compliance with law:" Reassessment: Authority of tax commission.

1. Sec. 1087—45 *et seq.*, Stats.,—providing that when the assessment of property in any district "is not in substantial compliance with law," etc., the tax commission may order a reassessment to be made and reviewed by persons appointed by the commission,—aims to correct substantial violation of the assessment laws by whomsoever committed. It authorizes a reassessment where an unjust and unequal assessment was made by the local assessor, even though, no complaint having been made to the board of review, that board was not called upon to review such assessment and consequently did not in any way violate its duty in the matter.
2. The legislature had power to grant such authority to the tax commission.

APPEAL from an order of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

The defendants appeal from an order overruling a general demurrer to the complaint and granting injunctional relief *pendente lite.* The action is brought in equity by a taxpayer and resident of the town of Summit in Douglas county to prevent the illegal expenditure of the funds of the town. The complaint states in substance that the town assessor prepared the assessment roll of the town in 1916 in accordance with law and laid the same before the town board of review,

which board examined the same and found no errors or omissions; that only two persons appeared before the board of review to complain of their assessments, and that the assessor, without action of the board, voluntarily corrected their assessments and therefore the board of review made no change in the roll; that the board of review performed its full duty, held all meetings and gave all notices required by law, but no persons appeared before the board to give evidence as to property being assessed too high or too low or being omitted from the roll; that the assessor of incomes did not report to the town clerk that any property was omitted or had not been assessed according to law, but that the Wisconsin state tax commission, on complaint of the county assessor of incomes alone, after a hearing at which no evidence was given showing any violation of law on the part of the board of review but only evidence relating to the acts of the assessor, it being claimed that the improved lands in the town were valued much below their real value and lower than unimproved lands, illegally and without jurisdiction ordered a reassessment of the property of the town and appointed the defendants *Bentley* and *Chaffey* as assessors to make such assessment and the defendants *LeClair, Clark,* and *Harris* to act as a board of review, fixing the compensation of each of such appointees at $5 per day; that said persons so appointed have commenced their work and will proceed therein and will incur an expense chargeable to the town of Summit exceeding $1,000; that the order of the commission appointing said assessors and board of review is illegal and void because there had been no violation of law on the part of the regular board of review, and that until there had been such a violation the tax commission had no power or jurisdiction to order a reassessment. A perpetual injunction was prayed for and an order restraining the defendants from acting *pendente lite.*

Upon the hearing of the motion for a temporary injunctional order it appeared by affidavit and by the record of the

testimony taken before the tax commission upon the hearing had before the making of the order for reassessment that the town assessor systematically assessed improved lands and farm buildings and live stock at about twenty per cent. of their value and wild and unimproved lands at more than their true value, and that the members of the town board of review knew the fact.

For the appellants there was a brief by *Archibald McKay* of Superior, district attorney, and the *Attorney General* and *E. E. Brossard,* assistant attorney general, of counsel, and oral argument by *Mr. Brossard* and *Mr. McKay.*

For the respondent the cause was submitted on the brief of *Luse, Powell & Luse* of Superior.

WINSLOW, C. J. The plaintiff sues as a taxpayer to prevent an alleged illegal expenditure of the town funds. If the complaint shows that the expenditure is legal he manifestly has no standing. We are of the opinion that this is exactly what the complaint shows.

Our statutes provide in substance (sec. 1087—45 *et seq.,* originally ch. 259, Laws 1905) that when it appears to the tax commission, on an investigation made on its own motion or on complaint and summary hearing, "that the assessment of property in any assessment district is not in substantial compliance with law and that the interest of the public will be promoted by a reassessment of such property," the commission shall have authority to order a reassessment of the property of the district by assessors and a board of review to be appointed by the commission and ultimately paid by the district.

The constitutionality of this act was fully sustained in the case of *State ex rel. Hessey v. Daniels,* 143 Wis. 649, 128 N. W. 565.

The complaint here shows that the tax commission acting under this law, upon complaint made and testimony taken,

directed a reassessment and appointed the assessors and a board of review to make such reassessment. No claim is made that the action of the tax commission was taken corruptly or without evidence. The only serious claim made is that the legislature cannot authorize the supplanting of local officers who have not violated their duty; that the complaint shows that the town board of review did not in any way violate their duty because no complaints were laid before them and hence they were not authorized or required to change the assessments as made by the assessor; and consequently that the tax commission has no power to order a reassessment or supplant the local board of review which has committed no breach of duty. The idea seems to be that where no one makes complaint to the board of review and consequently the board of review is not called on to review the assessment, the tax commission cannot order a reassessment, however unjust or corrupt the assessment as made by the assessor may be.

The argument is ingenious but not convincing. The law authorizes the commission to order a reassessment when the original assessment "is not in substantial compliance with law" and the public interest will be promoted thereby. An unjust and unequal assessment roll just as truly violates the law when the injustice results from the acts of the assessor alone as when it results from the acts of the board of review, or of both assessor and board combined. The statute aims to correct substantial violation of the assessment laws by whomsoever committed.

The complaint shows that the tax commission was acting within its duties, hence the demurrer thereto should have been sustained and the motion for a temporary injunctional order denied.

By the Court.—Order reversed, and action remanded with directions to sustain the demurrer and deny the motion for a temporary injunction.

WILL OF ELMORE: WISCONSIN TRUST COMPANY, Appellant, vs. ELMORE and others, Respondents, and others, Appellants.

February 15—March 13, 1917.

Wills: Construction: Vesting of estates: Trust: Duration.

1. A will gave one fourth of the residue of testator's estate to each of his two sons and the other half in trust for the benefit of his two daughters. One half of the income of the trust estate so created was to be paid to each daughter during her life, and at her death (or in case she died before the testator) was to be paid to her issue, if any, until they respectively attained the age of twenty-one, at which time each of said issue was to receive his or her share of one half of the principal of said trust estate. Any residue of the trust estate, including income thereof, not thus disposed of was to be paid to the testator's four children aforesaid, share and share alike—the issue of any deceased child to take by right of representation. It appeared that the testator had reasons for not wishing to leave any of his property in such a way that it would reach one of his sons-in-law, but did not wish to treat his two daughters differently. In view of that fact, and in view of the provision relating to a residue of the trust estate, it is *held* that the children of the testator did not take any vested interest in the *corpus* of the trust estate at the death of the testator; that but one trust was created, which was to continue until the death of both daughters and until their issue, if any, attained the age of twenty-one; and hence that one of the daughters could not by will dispose of her interest in the trust estate.
2. The law favors an early vesting of estates—but not contrary to the intention of the testator.

APPEALS from a judgment of the circuit court for Milwaukee county: EDWARD T. FAIRCHILD, Circuit Judge. *Reversed.*

Action to construe a will, begun in the county court and appealed to the circuit court. January 21, 1895, Riverious P. Elmore made his will making certain specific bequests not in dispute and containing among other provisions the following:

"All the rest, residue and remainder of my estate, real, personal or mixed, and wherever situate, of which I shall die seized, possessed or in any wise entitled, after payment of my just debts and the legacies hereinbefore mentioned, I give, devise and bequeath as follows:

"To each of my sons, Samuel Elmore and *Eltinge Elmore,* I give, devise and bequeath the undivided one-fourth ($\frac{1}{4}$) thereof to have and to hold the same to the use of themselves, their heirs and assigns absolutely and forever.

"The remaining one-half ($\frac{1}{2}$) thereof, I give, devise and bequeath to my executors hereinafter named, and the survivor or survivors of them and their successors or successor in trust, upon the trust following, to wit:

"In trust to take and hold, manage and control the said portion of my estate devised and bequeathed to them in trust, to satisfy all liens, mortgages or incumbrances thereon; to lease the real estate from time to time until the same shall be sold or disposed of, and to receive the rents, issues, profits and income of said trust estate, for the uses and purposes hereinafter mentioned; and in trust to sell and dispose of the said trust estate or any part thereof, from time to time or at any time, at public or private sale, and in such manner and upon such terms and at such price or prices as to them shall seem best, and the proceeds thereof to invest and reinvest and keep invested in such securities as to them shall seem best.

"And in trust to pay semi-annually, or oftener in their discretion, to each of my daughters, *Amelia H. Huntley* and Floretta Clason, who shall survive me, the one-half ($\frac{1}{2}$) of all the net income, interest and profit of said trust estate, as long as she shall live; and, if at the decease of either of my said daughters after my death she shall leave lawful issue her surviving, then and thereafter to pay to such issue, share and share alike, until they respectively attain the age of twenty-one (21) years, the said one-half of said net income, interest and profits of said trust estate, which I have heretofore directed to be paid to the mother of such issue during her life; and in trust to convey and assign to such issue, share and share alike, the said one-half ($\frac{1}{2}$) of the principal of such trust estate—the share of each of such issue therein to

be so conveyed, assigned and paid over to him or her when and as they respectively attain said age of twenty-one years.

"And in trust, in case my said daughters or either of them shall die before my decease leaving lawful issue surviving her, to pay to such issue who shall be living at the time of my decease the same share or portion of the income, interest and profits of said trust estate and of the principal thereof, at the same time and times and subject to the same conditions as such issue would have taken under this my will if such deceased daughter had survived me, and had hereafter died leaving such issue.

"And in trust to pay to and convey to my said four (4) children, share and share alike—the lawful issue of any deceased child taking by the right of representation—all the rest, residue and remainder of said trust estate, including the income, interest and profits thereof, not hereinbefore disposed of."

Mr. Elmore died December 22, 1897, survived by his widow, who died the following December before the entry of the final decree in his estate, and by four children, Samuel Elmore, *Eltinge Elmore, Amelia H. Huntley,* and Floretta E. Clason. Samuel died in 1910 survived by his widow, *Mary Furd Elmore,* and three children, *Magdalene Childs, Floretta Schriber,* and *Susan Haradon.* By will he left his entire estate to his widow. On March 22, 1915, Floretta E. Clason died leaving no husband, no issue, and no descendants of issue, and bequeathing by will all her estate to *Amelia H. Huntley,* appointing *Eltinge Elmore* her executor. The main question raised by the appeal is whether Floretta Clason took a vested interest in the trust estate upon the death of the testator which she could dispose of by will, or whether upon her death without issue her share should be conveyed by the trustee under the will of the testator to the remaining children or their issue by right of representation.

The county court held (1) that the entire trust estate was one and indivisible, and that no distribution should be made until the death of both life tenants; (2) that there was no vested estate in Floretta E. Clason, and since she

died without issue the remainder after the life estate should be divided by the trustee among her brothers and sister share and share alike, the children of Samuel to take their father's share; and (3) that the income arising from this half of the trust fund should be paid over by the trustee to the persons and in the shares mentioned until the termination of the trust.

Upon appeal to the circuit court the judgment of the county court was reversed and judgment was entered decreeing (1) that the trust as to the one-half terminated at the death of Floretta E. Clason; (2) that there was a vested remainder in the *corpus* of one half of the trust dependent upon the life of Floretta E. Clason, and this was vested in the four children of Riverious P. Elmore equally; and (3) of this vested remainder one fourth went to *Eltinge Elmore,* one fourth to *Mary Hurd Elmore* as residuary legatee of Samuel Elmore, deceased, one fourth to *Amelia H. Huntley* as a child of Riverious P. Elmore, and one fourth to *Amelia H. Huntley* by virtue of the will of Floretta E. Clason, deceased. From such a judgment the *Wisconsin Trust Company,* as trustee under the will of Riverious P. Elmore, appealed. The children of Samuel Elmore also appealed.

For the appellant *Wisconsin Trust Company* there was a brief by *Lines, Spooner, Ellis & Quarles* of Milwaukee, and oral argument by *Louis Quarles.*

For the appellants *Magdalene Childs, Floretta Schriber,* and *Susan Haradon* there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *Douglass Van Dyke.*

For the respondents *Eltinge Elmore,* as executor, and *Amelia H. Huntley* there was a brief by *N. L. Baker* and *W. J. Zimmers* of Milwaukee, and oral argument by *Mr. Baker.*

There was also a brief by the respondent *Eltinge Elmore, in pro. per.*

VINJE, J. The main question raised by the appeal is whether the children of the testator took an interest in the *corpus* of the trust estate that vested in them upon his death and which could be disposed of by them by will or otherwise, or whether the will created a trust estate to be held by the trustee until the death of the two life tenants and until their issue, if any, attained their majority and then to be divided among the children of the testator and their issue as directed by the will. We are favored with able and exhaustive briefs on both sides and numerous cases are called to our attention bearing upon the question presented. Rules for the construction of wills are also invoked in aid of our task. While authorities and rules are helpful, the main solvent in each case must be found in the will itself, interpreted in the light of the circumstances surrounding the testator. *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650; *Will of Ehlers,* 155 Wis. 46, 143 N. W. 1050. In the present case it is shown that the testator looked upon his son-in-law Clason as a spendthrift, and presumably for that reason did not wish to leave his property so that he could reach it. It further appears that while he did not entertain such an opinion of his son-in-law Huntley, yet in order not to single out his daughter Floretta alone for different treatment in his will he put the two sons in one class and the two daughters in another. It is evident that he desired to provide for the daughters as long as they lived by the payment to each of one half of the income of the trust estate. It is also evident that he considered that upon the termination of the trust estate there would or might be a *corpus* thereof to be disposed of, for the will provides "and in trust to pay to and convey to my said four (4) children share and share alike—the lawful issue of any deceased child taking by right of representation—all the rest, residue and remainder of said trust estate, including the income, interest and profits thereof, not hereinbefore disposed of." If he had intended that upon his death his chil-

dren would take a vested interest in the *corpus* of the trust estate, then there would be nothing for this residuary clause to act upon. If his children took a vested interest upon his death it would be theirs and pass by will to their legatees, or if they died intestate it would pass by operation of law to their heirs. In either event the testator's will could not affect it. There would be nothing for the trustee to convey. But if he did not intend their interest to vest upon his death, then in the event that either or both of his daughters died without issue there would be a residuary estate upon which this clause of the will would operate, making it the duty of the trustee to convey as therein directed.

In view of the reason there existed for not creating a vested interest in his daughter Floretta, and in view of the direction to the trustee to pay over and convey, which direction would be meaningless if the interests vested, we have reached the conclusion that the county court properly construed the will. Such construction harmonizes with the intent of the testator as shown by the circumstances surrounding him and gives meaning and effect to every part of the will. In coming to this conclusion we are not unmindful of the rule that the law favors an early vesting of estates. But this rule like all others must yield to the intent of the testator as disclosed by the whole will, giving effect if possible to every part thereof. Where such intent is discovered and when it is lawful and is consistent with the ordinary significance of the language used, and gives to each part thereof its natural meaning, force, and effect, it controls, and all rules of construction must yield to it. *Will of Smith, ante,* p. 207, 161 N. W. 749, and cases cited.

It seems quite evident that the scheme of the testator was to give to each of his two sons one fourth of his property absolutely; to leave one half in trust for the use of his two daughters as long as they lived, and for the use of their issue, if any, till they arrived at the age of twenty-one years;

then if they left issue to such issue, and if not, to his children if living at the time of the distribution, and if not, to their issue by right of representation. He did not wish that part of his estate left in trust to go to strangers, but to his own kindred.

But one trust was created and that was to continue till the death of both daughters and till their issue, if any, attained the age of twenty-one years. The duties of the trustee therefore continue as to the whole trust estate as found by the county court.

By the Court.—Judgment reversed, and cause remanded with directions to affirm the judgment of the county court. Appellant to recover taxable costs in this court, and respondents to recover taxable disbursements in this court, all to be paid out of the trust estate.

KERWIN and ESCHWEILER, JJ., dissent.

STATE EX REL. SHELDON, Receiver, and others, Respondents, vs. DAHL and another, Appellants.

FELTHOUSE, Appellant, vs. DAHL and another, Respondents.

January 18—April 4, 1917.

Officers: Breach of duty: State treasurer: Premature surrender of securities deposited by trust company: Liability to creditors: Nominal damages.

1. In the absence of proof that actual damages were naturally and proximately caused by the failure of a public officer to perform an official duty, only nominal damages are recoverable where a liability exists.
2. Where, prior to the recording, as required by sec. 1789, Stats., of the resolution dissolving a trust company which had deposited securities with the state treasurer pursuant to sec. 1791*e*, Stats. (ch. 504, Laws 1905), said treasurer surrendered the securities to the trust company, such surrender, even though made in good faith, was a breach of his official bond

and rendered him liable to the creditors of the trust company, if such premature delivery naturally and proximately caused them any actual damage.

3. It appearing in such case, among other things, that the securities were surrendered in good faith one day before the resolution of dissolution was recorded; that such surrender did not in fact prevent or prejudice the taking by the plaintiff creditors of any contemplated action to assert their rights to have the securities applied to the satisfaction of their demands; and that, even if the securities had not been prematurely surrendered, they would have been surrendered, in good faith and in the exercise of due care and diligence, before any active steps were in fact taken by plaintiffs to enforce their beneficial rights therein,—it is *held* that the treasurer's act, though a technical breach of his legal duty, did not cause any actual damage to plaintiffs, and hence that nominal damages only are recoverable.

WINSLOW, C. J., dissents.

APPEALS from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

The action is brought by plaintiffs against *Andrew H. Dahl* and the *National Surety Company* for an alleged breach of the bond of *Dahl* as state treasurer. It is alleged that the treasurer breached his bond by unlawfully surrendering securities deposited with him as state treasurer by the Wisconsin Savings Loan & Trust Company of Hudson, Wisconsin. The *National Surety Company* is the surety on the bond.

This case was before this court on appeal from an order sustaining a demurrer to the complaint. The statement of facts and pleadings contained in the report of the case on that appeal (150 Wis. 73, 135 N. W. 474) need not be repeated here. After the case was remanded to the circuit court for Dane county, that court determined that the action was one at law and that defendants were entitled to a jury trial. Thereafter upon application of plaintiffs the case was transferred to the circuit court for Fond du Lac county and a trial had in that court. The question whether the case

was one at law or in equity was raised in that court and Judge FOWLER ordered that the case proceed to trial before a jury, withholding final determination of this question. The case was tried to a jury and a special verdict was rendered. The court thereafter held that the action is one in equity and treated the verdict as advisory only. The court made its findings of fact and conclusions of law.

The jury found by answers to special questions as follows:

"(1) Would the defendant *Dahl* have exercised ordinary care as state treasurer had he held the $45,000 of securities until the resolution of dissolution was recorded in the office of the register of deeds of St. Croix county, and then turned them over to the trust company? *A.* Yes."

"(4) Did the defendant *Dahl* exercise ordinary care as state treasurer in turning over the remaining $5,000 securities on April 17, 1909? *A.* Yes.

"(5) Did the Wisconsin Blue Grass Land Company have sufficient profits on June 16, 1905, out of which to pay the bond dividend? *A.* No."

Among other findings the court made the following:

"2. That the Wisconsin Savings Loan & Trust Company was a corporation as in the complaint alleged with its principal office and place of business at Hudson, Wisconsin. That on March 10, 1908, the stockholders of said corporation, at a special meeting duly called for the purpose of considering dissolution, unanimously and duly passed a resolution declaring that the said 'Wisconsin Savings Loan & Trust Company be and the same hereby is dissolved and its business discontinued from and after the passage of this resolution.'

"3. That a certified copy of said resolution was filed in the office of the secretary of state of the state of Wisconsin on March 1, 1909; that a like copy was filed in the office of the register of deeds of St. Croix county, wherein Hudson is located, on March 2, 1909, at 8:30 o'clock a. m., and that the same was recorded in said office some time during the day of filing."

"4. That the defendant *A. H. Dahl* was at all the said times treasurer of the state of Wisconsin and as such held in his possession certain securities belonging to the said trust company for the purposes and under the trust designated and prescribed by sec. 1791*e*, Wis. Stats. 1898, as it then stood in force. That on March 1, 1909, said *Dahl* turned over to the representatives of the said trust company securities then in his possession as aforesaid of the value of $37,221.79, and that on April 17, 1909, he turned over to representatives of said corporation the remaining securities held by him as aforesaid of the value of $5,000.

"5. That the turning over of said securities as aforesaid was induced and procured in reliance upon the truth of a statement in the form of an affidavit signed and purporting to be sworn to before a notary by one N. B. Bailey, the then president of said company, and who had theretofore been active in the management and was familiar with the affairs of said corporation. That said statement recited, among other things, that the debts of the said corporation were wholly paid and that it had no outstanding obligations. That the said *Dahl* believed the said representations and acted thereon in entire good faith in the surrender of the said securities.

"6. That in turning over the said first lot of securities the defendant *Dahl* did not act with due diligence and ordinary care, and that under the circumstances then present he would not have exercised due diligence and ordinary care had he turned them over when the said resolution of dissolution was recorded in the office of the register of deeds at Hudson, and that the turning over of the said securities proximately caused injury to such of the relators as were at the time creditors of the said trust company within the meaning of sec. 1791*e*, Wis. Stats. 1898.

"7. That in turning over said second lot of securities the defendant *Dahl* exercised due diligence and ordinary care.

"8. That at the time the defendant *Dahl* turned over said securities there were outstanding and not yet due a large number of bonds theretofore issued by the Wisconsin Blue Grass Land Company, a Wisconsin corporation. That the said trust company prior to the issue of said bonds had entered into an agreement with said other corporation, in man-

ner and form as set out in the complaint, whereby it had undertaken to act as trustee for the holders of said bonds. That by said contract securities were to be turned over to the trust company by the said Wisconsin Blue Grass Land Company to the amount of twenty per cent. in excess of all bonds issued, the trust company was to hold such securities in its possession and collect the principal and interest thereof and pay therewith the principal and interest on bonds issued to the holders thereof as the same fell due, and was to countersign said bonds and certify thereon that each issued was one of the series for payment of which it held securities as aforesaid, and that no bonds were to be valid until so countersigned. That said bonds all bear date as of July 1, 1905, bear interest at the rate of six per cent. payable semi-annually, are negotiable in form, and fall due by their terms on July 1st at different years between July 1, 1909, and July 1, 1914." . . .

"10. That subsequent to the issue of said bonds the said Wisconsin Blue Grass Land Company assigned all its assets to another corporation, the Northern Blue Grass Land Company by name, which assumed all its debts and obligations, and was at the time of the dissolution of said trust company liable for the payment of said bonds. That said Wisconsin Blue Grass Land Company at the said time of dissolution had no assets whatever. That at the time of dissolution of said trust company as aforesaid the said Northern Blue Grass Land Company was insolvent. That thereafter in proceedings for winding up its affairs in the federal court of the Western district of Wisconsin, a receiver was appointed, and assets were collected and administered sufficient to pay to its creditors a dividend of two per cent. and not in excess thereof, not making any deductions for attorney fees or expenses of administration." . . .

"13. That prior to the actual dissolution of said trust company its directors had voted to borrow from the Union Investment Company, a corporation, the sum of $35,000 to raise money with which to pay its debts other than obligations in connection with said bonds, and to pledge certain securities it then had in its own possession, of the value of $10,917.19, and also all securities in the hands of the state

treasurer, to secure the payment of said loan. That this resolution was passed November 13, 1908, and among the directors voting therefor were the relators Bailey, Bell, and F. E. Settergren, for whom the relator *Battles* is trustee in bankruptcy. That the said resolution contemplated the procuring of all securities from the state treasurer and turning them over to the said Wisconsin Mortgage Loan & Investment Company. That the following relators and claimants herein as bondholders were stockholders of the said trust company at the time of the passage of the said resolution of March, 1908, and voted therefor in person or by proxy, viz. *E. A. Rademacher, J. K. Hannay,* George W. Bell, William Paulton, and A. H. Barber. There also voted for said resolution the following stockholders, viz. F. E. Settergren, represented by relator *E. J. Battles,* his trustee in bankruptcy, G. W. Pittman, also represented herein by said *Battles* as his trustee in bankruptcy, and N. B. Bailey, who is represented herein by the relator, his trustee in bankruptcy, E. B. Kinney."

By finding 14 the court finds that shortly after such resolution numerous claimants and plaintiffs signed an instrument as follows:

"The undersigned holders of bonds issued by the Wisconsin Blue Grass Land Company, the collateral securing which being held by the Wisconsin Savings Loan & Trust Company of Hudson, Wisconsin, owing to the fact that the Wisconsin Savings Loan & Trust Company is to retire from business, hereby agree and consent that the securities securing these bonds be held by the Wisconsin Mortgage Loan & Investment Company, a corporation which is being formed to succeed the trust company, it being understood that the Wisconsin Mortgage Loan & Investment Company will carry out the same contract entered into by the trust company."

"15. That the said Wisconsin Mortgage Loan & Investment Company was organized for the transaction of business, and that sufficient stock, paid for by surrender of certificates in the said trust company, was issued to enable it to commence business. But the said corporation has no assets, and is unable to pay any sum to its creditors."

By findings 16 and 17 the court finds in effect that a portion of the bonds issued by the Blue Grass Land Company and held by plaintiffs were so issued as dividend bonds pursuant to resolutions of such company and to be deposited with the Savings Loan & Trust Company as trustee, but that the company in fact had no dividend to distribute. The court finds by findings 18 to 46 inclusive the ownership of the bonds by various plaintiffs and the amounts due thereon.

"47. That the defendants executed the bond set forth in the complaint, and that in surrendering said first lot of securities by said *Dahl* as above found the said *Dahl* failed to 'faithfully discharge the duties of his office' as state treasurer, and failed to 'deliver' to the persons 'authorized by law to receive the same all papers and other articles and effects belonging to said office.'"

The court, as conclusions of law, among other things held:

"1. That the Wisconsin Savings Loan & Trust Company became liable to the holders of said bonds under its said contract, by reason of its said breach thereof, for all damages sustained by reason of its said breach, and that the holders of such said bonds as were valid in their hands who have not by their acts waived or become estopped from asserting their rights were creditors of the said trust company at the time of the surrender of said bonds by the defendant *Dahl* as aforesaid."

"5. That all bondholders who were stockholders in the said trust company at the time of the passage of the stockholders' resolution of dissolution, by their act in voting for dissolution as aforesaid and by failing to notify the defendant *Dahl,* prior to his surrender of the securities held by him, of claims against him waived all rights they otherwise might have had as creditors against the defendant *Dahl* as trustee.

"6. That such relators as are *bona fide* holders of bonds for value before maturity in due course are creditors of the said trust company within the meaning of sec. 1791*e,* Wis. Stats. 1898, and such thereof as have not waived or estopped themselves from asserting right thereto are entitled to recover herein against the defendants."

"8. That the measure of damages to the relators who are entitled to recover herein is the difference between the amount they would have received had the defendant *Dahl* retained said securities in his possession as trustee under said statute and the amount they will receive from the trustee in bankruptcy of said Northern Blue Grass Land Company and the receiver of said trust company."

"11. That the surrender of said securities by said *Dahl* as found was a breach of his bond given by himself and the defendant surety company, and the defendant surety company is liable upon said bond to the same extent and amount as the defendant *Dahl* is liable by reason of his surrender of said securities."

The court awarded judgment pursuant to such findings and conclusions of law in favor of *H. T. Sheldon* as receiver, for the benefit of the plaintiffs the court found entitled to recover. This is an appeal from such judgment.

For the plaintiffs there were briefs by *Richmond, Jackman & Swansen* of Madison, attorneys, and *Sanborn & Blake* of Madison and *Young & Stone* of St. Paul, Minnesota, of counsel; and the cause was argued orally by *John B. Sanborn.*

For the defendants there were briefs by *Jones & Schubring* of Madison, attorneys for *Andrew H. Dahl,* and *Miller, Mack & Fairchild* of Milwaukee, attorneys for *National Surety Company;* and the cause was argued orally by *Burr W. Jones* and *E. J. B. Schubring,* and by *James B. Blake* of Milwaukee.

SIEBECKER, J. The judgment is assailed by the defendants upon the grounds that the trial court erred in holding (1) that this is an action in equity and that the verdict of the jury can be treated only as advisory; (2) that the defendant *Dahl* would have been guilty of a want of ordinary care had he turned over the first $45,000 lot of securities when the resolution of dissolution of the trust company was

recorded in the register of deeds' office as required by law; and (3) that the surrender of the first lot of securities by the state treasurer, under the facts and circumstances shown, constitutes an injury to plaintiffs which naturally and proximately caused actual damage to the plaintiffs who were at the time creditors of the trust company, within the meaning of sec. 1791*e*, Stats. 1898.

Counsel have made an exhaustive presentation of the questions litigated and their briefs have afforded the court valuable assistance in the study and consideration of the case. In the view we take of the case it will be necessary to discuss but one question, namely, Did the surrender of the securities by the defendant *Dahl* as state treasurer, under the facts and circumstances established by the evidence in the case, naturally and proximately cause the plaintiffs any actual damage? In the determination of this question it will be well to refer to the decision on the former appeal of the case to this court (150 Wis. 73, 135 N. W. 474), in order to have before us the law of the case as established in that decision. It was there held that the official duties imposed on the state treasurer under sec. 1791*e*, Stats. (ch. 504, Laws 1905), to hold securities or cash deposited by a trust company for the benefit of such parties as the statute specifies, is a duty guaranteed by the treasurer's official bond. As to the nature of that duty the court declared:

"There can be no mistake about the scope of that duty, no room for the exercise of judgment or discretion. The securities are required to remain in the possession of the treasurer for the trust purposes named 'at all times during the existence of the corporation.' Sec. 1791*e*, Stats. Now if the statute fixes a definite time at which the corporation ceases to exist, there can be no question of doubt under the statute as to the duty of the treasurer previous to that time."

The court proceeded and stated that when a corporation like a trust company proceeds voluntarily to dissolve it ceases to exist for the purposes of the provisions of sec. 1791*e*,

Stats., when certified copies of the resolution of dissolution have been filed and recorded as required by sec. 1789, Stats. The effect of the decision respecting the duties of the trust company is stated as follows:

". . . after that time the treasurer remains in possession of the securities still charged with the duties of a trustee, but relieved from the absolute mandate to retain possession. During this time if any court having jurisdiction of the subject matter and of the parties directs that the moneys be delivered over to an officer of the court, or to a third party, the treasurer will, of course, be protected in obeying such order; probably he would be protected also in releasing the funds without the order of a court if he act in good faith and exercise reasonable care and diligence."

Whether or not a surrender in good faith without reasonable care rendered defendant liable was left an open question. The facts of the case are now before us to determine whether or not the state treasurer, *Mr. Dahl,* did exercise reasonable care and act in good faith in surrendering the securities in the manner and at the times he did. The court and jury found that the treasurer's actions in this regard were in the best of faith and the facts abundantly sustain this conclusion. The court and jury also found that the treasurer exercised reasonable care and diligence in the surrender of the $5,000 lot of securities on April 17, 1909, and this finding is also well sustained by the evidence. The court and jury are not agreed on the question of the treasurer's exercise of ordinary care had he held the securities until the dissolution resolution was filed on March 2d in the office of the register of deeds and then surrendered in the manner he did on the 1st of March. The jury found that the surrender of them on the 2d of March, under the facts shown, would have been an act in the exercise of reasonable care, but the court found that under the facts and circumstances shown such a surrender would have been a want of such care. The jury's finding, however, does not exempt *Mr. Dahl* from lia-

bility for surrender of the securities on March 1st, the day before the dissolution resolution was in fact recorded, because the surrender of them on March 1st, as above shown, constituted a legal breach of his bond and rendered him liable to creditors, if such premature delivery naturally and proximately caused the plaintiffs any actual damage. The fact that the corporation was legally dissolved on March 2d, except for winding up its affairs, is established. This authorized the treasurer to surrender the securities at that time or thereafter, under proper circumstances, either to the owner or to creditors of the owner showing a right thereto within the contemplation of the provisions of sec. 1791*e*, Stats. The facts are undisputed that none of the plaintiffs took any active steps to enforce their rights or obtain legal custody or secure possession of the securities for the benefit of creditors for months after March 1, 1909. It is uncontroverted that the treasurer did, upon the demand of the Savings Loan & Trust Company, depositor and the owner of the securities, and the Union Investment Company, as assignee thereof, surrender them to the trust company and that they were immediately turned over to the Union Investment Company under the assignment of the trust company to the investment company made November, 1908, and that the proceeds thereof were applied in payment of a $35,000 debt then owing by the trust company to the investment company.

The facts and circumstances of the case show conclusively that the action of the state treasurer on March 1st did not cause the plaintiffs to change their course of conduct or have any connection with plaintiffs' failure to take immediate steps to have the securities applied in satisfaction of their claims against the trust company, and that the release of them by the treasurer on the day before the trust company was lawfully dissolved did not in fact prevent or prejudice the plaintiffs from taking any contemplated action on their part to assert their legal rights to have the securities applied in

satisfaction of their demands against the trust company. *Dahl* has not wrongfully appropriated the securities or the proceeds thereof to his own individual use, and he has none of their avails in his possession either personally or as state treasurer. The failure of the trust company to meet its obligations as trustee of the Blue Grass Land Company, caused by the dissipation of the trust company's property and securities, is wholly independent of the alleged breach of duty of the state treasurer and is solely attributable to the misconduct of the officers and agents of the trust company, and the treasurer is in no way implicated with them in their wrongdoing. The claim made against the treasurer for damages resulting from the breach of his official duty in prematurely delivering the securities is in no way connected with any legal liability for such misconduct of the corporation officials. In fact the injuries caused the plaintiffs by such official misconduct were occasioned a long time prior to March 1st.

The question presented by the record is this: Did the treasurer's act of surrendering the securities as he did on March 1st, under the facts and circumstances of the case, naturally and proximately cause the plaintiffs any actual damage? Of course the treasurer's technical breach of duty in making delivery of the securities on March 1st does not of itself prove that plaintiffs suffered actual damage therefrom, nor does it vest plaintiffs with an absolute right to recover the value of the securities as the measure of their damages. The gravamen of the cause of action stated in the complaint is that the alleged breach of the treasurer's legal duty on March 1st caused plaintiffs the loss of the securities and thus caused them the actual damage of losing payment of their bonds. The relief demanded is clearly and plainly compensation for damage alleged to have been naturally and proximately caused by this breach of legal duty. The ordinary rules of proof of damages to compensate for injuries recognized in the law are applicable in this case. It is ele-

mentary that damages must be certain in their nature and that they are to a reasonable certainty the natural and proximate result of a known cause. Applying these rules to the facts before us, we have an established and certain breach of a legal duty by the treasurer in that he surrendered the securities on March 1st, contrary to law. It also appears that on March 2d, or any time thereafter, he had the legal right to surrender the securities to the parties to whom he delivered them on the 1st of March, if the delivery was made in good faith and in the exercise of reasonable care. The evidence shows that the mere surrender of them on March 1st was no more than a technical breach of duty. It also appears that the plaintiffs were not thereby induced to forego any immediate active steps to enforce a claim to these securities, nor is there any evidence tending to show that plaintiffs' relations to these securities would have been different in any particular than they actually are and have been, if such transfer had taken place on March 2d instead of March 1st. We have made exhaustive search to find any evidence tending to show that different consequences did immediately flow out of the surrender of the securities on March 1st than possibly could have resulted from a surrender of them on March 2d, or at any time up to April 17th when the last $5,000 lot was surrendered, and we find the record barren of evidence tending to show that the consequences would have been different from what they actually are. It is therefore self-evident that the surrender of the securities on March 1st in fact caused no more actual injury or damage than a surrender of them on the 2d of March or at any time up to April 17th would have caused. It necessarily follows from these facts that the plaintiffs' beneficial interest in the securities was not affected by the bare fact of the premature surrender of the securities on March 1st instead of March 2d, or at any time thereafter before the plaintiffs took active steps to enforce their beneficial interest in them. As held by the circuit court on this point: "They are as well off in every re-

spect as they would have been had the surrender been made at the later time instead of when it was." We are also fully satisfied that the treasurer properly surrendered the $5,000 lot of securities on April 17th. As above stated, the evidence amply sustains the court and jury in finding that he acted in good faith and with due care in making this surrender. We are persuaded from all the facts and circumstances disclosed by the evidence that *Dahl* would have surrendered all the securities not later than April 17, 1909. The trial court entertained the view that if *Mr. Dahl* had waited another day before surrendering any securities, *it is conceivable that he might not have surrendered them at all to the trust company,* and even though it is shown that he would have turned them over when he learned that the dissolution resolution had been properly filed, "we cannot say that he certainly" would have done so. We are convinced that the record clearly negatives this conclusion. It appears that *Mr. Dahl* learned of some claims against the securities and that he had conferences, interviews, and correspondence in the matter, yet nothing came to his knowledge that suggests he would have taken a course different from what he did. Nor is there any fact or circumstance tending to show that the actual state of affairs of the trust company and the unfortunate conditions of its creditors would properly have come to his knowledge. To say he might have learned things which would have caused him to hold the securities and that these plaintiffs would have received a benefit therefrom, is a mere speculation and conjecture. All the evidence clearly preponderates to refute such claims and tends to show that he would have surrendered the securities on or before April 17th, and that such a surrender would have been, as the one on April 17th actually was, in good faith and in the exercise of due care and diligence. The inference from these ultimate facts in the case leads to the irresistible conclusion that plaintiffs suffered no actual damage immediately flowing out of the breach of duty of the treasurer on March 1st. Though this technical breach

of duty is in law presumed to be an injury causing some damage, the evidence fails to show with any reasonable certainty that it naturally and proximately caused the plaintiffs any actual damage. This injury can be said to have resulted in no more than the legally presumed nominal damage.

The principle ruling the question of damages for official breach of duty applicable when a sheriff fails to produce the body of a debtor, as required by law, or his failure to attach and seize property under command of the law to satisfy the claim of a judgment creditor, is an exception to the general rule measuring the liability of officers for breach of official duty, and is not applicable here. 1 Sutherland, Damages, § 160. In the case of *Dow v. Humbert,* 91 U. S. 294, the strict rule of damages in such cases was held to have been modified, the court declaring:

"It is not easy to see on what principle of justice the plaintiff can recover from defendants more than he has been injured by their misconduct. If it were an action of *trespass,* there is much authority for saying that plaintiff would be limited to actual and compensatory damages, unless the act were accompanied with malice or other aggravating circumstances. How much more reasonable, that for a failure to perform an act of official duty, through mistake of what that duty is, that plaintiff should be limited in his recovery to his actual loss, injury, or damage!"

The court held in substance that in the absence of proof showing that actual damages were naturally and proximately caused by an omission of official duty, only nominal damages are recoverable where a liability exists. This rule underlies the decisions in *State v. Bætz,* 44 Wis. 624; *State v. Ruth,* 14 S. Dak. 92, 84 N. W. 394; and *Branch v. Davis,* 29 Fed. 888.

It is considered that upon the record it is shown that the defendant *Dahl* acted in good faith in surrendering the securities on both March 1st and April 17th, and that though *Dahl* technically breached his duty in surrendering part of

such securities on March 1st, one day before he could legally do so, such breach of duty did not naturally and proximately cause plaintiffs any actual damage, and hence no more than nominal damages can be awarded. This result renders it unnecessary to consider any of the other questions presented to the court on this appeal.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court with direction to enter judgment awarding the plaintiffs nominal damages and awarding the defendants judgment for costs.

VINJE, J., took no part.

WINSLOW, C. J. (*dissenting*). I have been unable to agree with the conclusions of the court in this case and I wish to state very briefly my reasons. The purpose of sec. 1791*e*, Stats., is to make it certain that the creditors of a trust company shall have a substantial amount of collateral security in the hands of the state treasurer at all times during the existence of the company, to which they may resort for payment of their claims in case the trust company fails to pay them. The duty to keep the securities intact up to the very moment when the trust company ceases to exist is absolute. *State ex rel. Sheldon v. Dahl,* 150 Wis. 73, 135 N. W. 474. It is established here that the securities were surrendered during the life of the trust company, that they are no longer within the reach of the creditors, that the relators, or at least a part of them, are creditors of the trust company for whose benefit the deposit existed, that they have exhausted their remedy against the trust company, and that they are still unpaid. That these facts make a *prima facie* case of breach of the treasurer's official bond resulting in injury to the relators cannot be doubted. This is only met by the argument that the evidence conclusively shows that no damage resulted to the relators by reason of the surrender of the securities just

before the legal decease of the company, because they would have been surrendered with exactly the same result a day or two later, just after the legal decease of the company, when their surrender would have been authorized and legal. In my opinion this is pure speculation. What in fact happened after March 1st furnishes no persuasive proof of what would have happened had there been no delivery of the securities on that day. To my mind it seems extremely probable that the treasurer would not have delivered them at all had he waited until March 2d. At that time both the trust company and the Northern Blue Grass Land Company were financially embarrassed and practically bankrupt. The Wisconsin Blue Grass Land Company turned over all its assets to the Northern Blue Grass Land Company in March, 1908, the latter corporation assuming to pay all liabilities of the former. As a matter of fact, the personnel of the two companies was the same. There had been a period of "high finance" at Hudson and the harvest of bankruptcy and ruin was being reaped. The officers of the trust company and the two land companies were the same, and they juggled securities back and forth whenever necessity required. On March 1, 1909, there were no securities left in the hands of the trust company to protect the bond issue of the Wisconsin Blue Grass Land Company. The trust company had on November 13, 1908, borrowed $35,000 from the Union Investment Company of St. Paul for the purpose of paying up its indebtedness, which at that time was about $50,000, besides $55,000 face value of the bonds of the Wisconsin Blue Grass Land Company outstanding. The Union Investment Company knew nothing of these last named bonds nor of the agreement of the trust company to hold securities for their protection, and hence knew nothing of the claims which might be made against the trust company for breach of its contract with reference to those bonds. When the negotiations were on between Mr. Haven, acting for the trust company, Mr. Nye, acting for the Union

Investment Company, and *Mr. Dahl,* for the surrender of the securities in question, nothing was said about any possible liability on the Blue Grass Company bonds. The situation was delicate; there might be an explosion at any time if this additional liability was discovered. *Dahl* was finally persuaded to turn over $45,000 face value of the securities, retaining $5,000 as a measure of safety. At that time he had received no claim from any one. An inquiry had been made by one Ring on February 26th, but no claim made. On the morning of March 2d *Dahl* received a letter from Ring stating that he had a claim against the trust company *as trustee* and asking that the securities be retained until it was satisfied. On March 4th *Mr. Dahl* received a like letter and demand from one Greer. He at once wrote letters to the trust company and to Haven expressing surprise, demanding an explanation, and stating that he would hold the remaining $5,000 of securities for a time. There was at once activity on the part of Bailey; Ring was paid by check, and the Greer claim was bought by the Northern Blue Grass Land Company by giving a mortgage on some of its lands. Bailey and Haven wrote letters on March 5th and 6th respectively explaining that the claims had been settled. In these letters *Mr. Dahl* first learned of the bond issue, but was assured that the claims were not valid. On April 14th Mr. Haven sent to *Mr. Dahl* written statements signed by Greer and Ring that they had no claims against the trust company, and on April 17th following *Mr. Dahl* surrendered the remaining $5,000 of securities to Mr. Haven. My proposition is that no one can say what would have happened had *Mr. Dahl* held the securities until March 2d instead of surrendering them on March 1st. At that time he would have been in possession of the letters from Greer and Ring making definite claims on the fund. It is most improbable that he would have ignored these claims; his letters of surprise to Bailey and Haven are proof enough of this. He would doubtless have

retained the entire $50,000 of securities. What effect would this have had on the attitude of the Union Investment Company, which was financing the trust company's retirement and knew nothing of the liability resulting from the bond issue? The investment company advanced $10,700 of new money to the trust company on March 19th. Would Bailey have been able to raise the money to buy up the Ring and Greer claims if the true situation had become known, the securities retained by *Dahl,* and the investment company thereby delayed in obtaining the securities for which it was clamoring? Is it not extremely probable that there would have been an explosion had the investment company been unable to obtain the securities, especially when it learned for the first time of the bond issue? Would not the treasurer have ascertained the utter falsity of the affidavit of Bailey to the effect that the trust company owed no debts or obligations of any kind when in fact it owed many thousands of dollars to the investment company and was contemplating a further loan? Would not the treasurer have demanded a complete investigation of the whole situation before releasing the securities if these facts had been before him?

The events of life are complicated and interdependent. A comparatively insignificant circumstance may lead on to the most momentous consequences. No man is wise enough to say what would have been the result had the apparently insignificant circumstance never happened. That must always remain pure conjecture. So I say in the present case that no one can say with any certainty what would have happened had the treasurer performed his duty as the statute lays it down, and hence I think the *prima facie* case of damage resulting from the treasurer's breach of duty is not met. It seems to me that a law expressly framed to protect the creditors against the dishonesty or business inefficiency of officers of trust companies has not been enforced in this case, and I regret the result.

SUELFLOW, Respondent, vs. SUPREME LODGE, KNIGHTS AND LADIES OF HONOR, Appellant.

February 14—April 4, 1917.

Life insurance: Benefit certificate: Change of beneficiary: Married women: Cancellation of certificate: Action by beneficiary.

1. As to a fraternal benefit certificate issued prior to the enactment of ch. 376, Laws 1891 (amending sec. 2347, Stats.), that statute did not take away the vested right of the assured to change the beneficiary named, even though she was his wife; nor did sec. 3, ch. 175, Laws 1895 (sub. 5, sec. 1957, Stats.), change in any way the rights of the assured to deal with such a certificate.
2. Where the manner of making a change of beneficiaries is not prescribed in the benefit certificate nor in the constitution, by-laws, or regulations of the society, any definite designation of a different beneficiary will suffice.
3. When the beneficiary named in a fraternal benefit certificate had a mere expectancy of which she might at any time be deprived by the act of the assured without her consent, she cannot during the life of the assured maintain an action for damages on the ground that the society has wrongfully canceled the certificate.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

Action by a beneficiary in a contract of insurance, made by a fraternal insurance society with her husband, to recover damages caused by an alleged wrongful cancellation thereof.

The situation, so far as necessary to an understanding of the vital question on this appeal, was this:

The defendant is a fraternal insurance corporation of the order of *Knights and Ladies of Honor,* organized under the laws of the state of Indiana, without capital stock, for the mutual benefit of the members of the society. Herman Suelflow, plaintiff's husband, became a member of the society by joining the Milwaukee, Wisconsin, branch thereof, January 15, 1890, which was then under the jurisdiction of a Mis-

souri corporation of the order. In due course and form, pursuant to his application, he received a benefit certificate, entitling his wife, the plaintiff, at his death, upon condition of his complying "with all the laws, rules and requirements relating to said relief fund, and the laws in general of the *Knights and Ladies of Honor,*" to participate in the relief fund to the amount of one thousand dollars. The society was dependent upon assessments upon the certificate holders for securing means to respond to calls for payment of contracts as they matured. The constitution of the corporation rendered it competent for it to make a beneficiary certificate payable to "such member or members of the family of said deceased or to a person or persons dependent upon said deceased or related to him or her, as he or she may have directed." There was no prohibition or regulation on the subject of changing the beneficiary. On November 25, 1891, the defendant, a corporation of the same kind as the one which issued the certificate, for value, duly assumed all the obligations of the former and the relations between defendant and the assured became thereby, subject to his assent, the same as they were between him and the Missouri corporation. He consented to the change by making payments of assessments, in due course, and complying with two increases. January 1, 1910, a further increase of assessments was made, applicable to memberships in a different way than when the assured's certificate was issued or was then provided for. While formerly every member was rated for periodical assessments as of his age at the date of his application, under the new plan a member who entered the society after January 1, 1900, was rated as of the date of his entry, and all others as of their ages on said January 1st. That changed the assured's rating from the basis at forty-eight to that at fifty-eight years of age and made the burden upon his membership materially greater than it would have been under the former method. He tendered payment of assessments at his

previous rate, refusing to submit to the new order of things. The tender was refused and his membership and certificate treated as forfeited under the by-laws. If he were bound by the change which he so refused to submit to, he forfeited all rights under his certificate, otherwise not. The application for the certificate contained this:

"Compliance with all laws and regulations governing said fund now in force, or that may hereafter be enacted by said order . . . is the express condition and warranty upon which I am to be entitled to participate in its relief fund, as the constitution and laws of the order provide."

The assured was sixty-nine years of age and in such poor health as not to be an insurable risk, when his membership was canceled. He then had an expectancy of life of 9.15 years. He was alive when the action was commenced. Plaintiff then had possession of the certificate and sought to recover damages sustained by her through its cancellation.

The trial court held that the action was maintainable and assessed plaintiff damages at $1,000 and interest from the date the contract of insurance was breached.

For the appellant there was a brief by *Quarles, Spence & Quarles* of Milwaukee and *Ashcraft & Ashcraft* of Chicago, Illinois, attorneys, and *J. V. Quarles,* of counsel; and the cause was argued orally by *J. V. Quarles.*

For the respondent there was a brief by *Otjen & Otjen* of Milwaukee, and oral argument by *Henry H. Otjen.*

MARSHALL, J. The first question to be considered is whether respondent could properly maintain an action for damages during the lifetime of her husband, even if the contract of insurance were wrongfully canceled, as claimed. If not, then we need not go further and should not, since the assured is not a party to the action.

If respondent's interest in the contract of insurance was absolute—free from control of her husband to take it from

her without her consent—under sec. 2347, Stats., as the trial court evidently assumed and counsel for respondent contend, and it was wrongfully canceled, the case is ruled in her favor by *Merrick v. Northwestern Nat. L. Ins. Co.* 124 Wis. 221, 102 N. W. 593. The court there dealt with an ordinary policy of life insurance taken out by a married man for the benefit of his wife, referring to such section as found in the Statutes of 1898, and saying in effect that, subject to the wife deceasing before her husband, the insurance was her sole and separate property free from the control or disposition of her husband, citing *Canterbury v. Northwestern Mut. L. Ins. Co.* 124 Wis. 169, 102 N. W. 1096. It was upon that ground that the action by the wife, during the lifetime of her husband, for damages for the wrongful cancellation of the insurance was held maintainable.

If the interest of the respondent, in the contract of insurance, subject to the contingency of her predeceasing her husband, was not her sole and separate property, free from his control or disposition, so he was competent to defeat it without her consent by a change of beneficiary, then the case is ruled in favor of appellant by *Slocum v. Northwestern Nat. L. Ins. Co.* 135 Wis. 288, 115 N. W. 796. The court there dealt with an ordinary policy of life insurance in which a person, other than the wife of the assured, was named as beneficiary, and held, citing *Rawson v. Milwaukee Mut. L. Ins. Co.* 115 Wis. 641, 92 N. W. 378, that the interest of the beneficiary was a mere expectancy, which was "subject to be defeated by the act of the insured, and hence cannot be absolute and indefeasible until the death of the insured;" that the "rights and interests of the beneficiary [were] too hypothetical to be made the ground for damages for a breach of the contract."

In the *Rawson Case* the court dealt with a benefit certificate and held that, "except so far as the power is limited or taken away by sec. 2347, Stats. 1898, where a married woman

is the beneficiary" the assured may dispose of the policy in any manner he sees fit "not inconsistent with the terms of the policy, to the exclusion of the beneficiary named therein;" that "the interest of the beneficiary" in a mutual benefit certificate is no "less substantial than the interest of a beneficiary in an 'old line' policy, where the assured pays the premiums." Each (subject to sec. 2347, Stats.) "is subject to extinction by the act of the insured, and it may be said as reasonably of one as of the other that it may rightly be considered as a vested interest, subject to the right of the insured to divest it."

By the foregoing, *Foster v. Gile,* 50 Wis. 603, 7 N. W. 555, 8 N. W. 217, and other cases, it is the settled law of this state that one who procures a benefit certificate and makes the payments thereon, subject to the terms of the contract and the written law, may change the beneficiary named therein without such beneficiary's consent. The change, subject to some exceptions mentioned in *McGowan v. Supreme Court I. O. F.* 104 Wis. 173, 80 N. W. 603, must be made in the manner required by the contract and the rules of the association. *Faubel v. Eckhart,* 151 Wis. 155, 138 N. W. 615; *Preusser v. Supreme Hive L. O. T. M.* 123 Wis. 164, 101 N. W. 358; *Berg v. Damkoehler,* 112 Wis. 587, 88 N. W. 606; *Waldum v. Homstad,* 119 Wis. 312, 96 N. W. 806, and other cases are to the same effect.

We will now consider whether the right of the assured to deal with the benefit certificate in question, without the assent of the beneficiary, is affected by sec. 2347, Stats.

The certificate was issued in 1890. Then sec. 2347, S. & B. Ann. Stats., as regards insurance of the life of a person, made payable to a married woman, provided that "every such policy . . . shall inure to her separate use and benefit . . . and in case of her surviving the period or term of such policy, the amount of the insurance shall be payable to her . . . for her own use and benefit, free from the claims

of her husband," etc. By ch. 376, Laws 1891, the section was so changed as to provide that the policy "*shall be the sole and separate property of such married woman,* and shall inure to her separate use and benefit . . . and in case of her surviving the period or term of such policy, the amount of the insurance shall be payable to her . . . for her own use and benefit, free from *the control, disposition* or claims of her husband," etc. The change, in terms, was made to "apply to all insurance on lives effected before" the enactment. It was such change which abrogated the judicial rule that a married woman beneficiary in a policy of life insurance has no interest therein during the life of the assured which he cannot take away by making some other person the beneficiary. *Ellison v. Straw,* 116 Wis. 207, 92 N. W. 1094; *Canterbury v. Northwestern Mut. L. Ins. Co.* 124 Wis. 169, 102 N. W. 1096. Policies issued prior to the act of 1891 were not affected thereby, notwithstanding the legislative effort to the contrary. The rights of the husband as to insurance effected before the change were valuable, vested property interests which the legislature could not take away. They were protected by constitutional safeguards, state and national. *Boehmer v. Kalk,* 155 Wis. 156, 144 N. W. 182; *Northwestern Mut. L. Ins. Co. v. Adams,* 155 Wis. 335, 144 N. W. 1108.

It follows that sec. 2347 did not create any disability of the assured in this case to take away respondent's interest in the beneficiary certificate without her consent. It does not cut any figure here as the cases referred to clearly indicate.

The reasons which render sec. 2347 immaterial apply to sub. 5, sec. 1957, Stats., which provides that "Any member may change the beneficiary named in his certificate or policy without the consent of such beneficiary, by complying with the by-laws of the society, order or association which issued the same." That seems to have originated in 1895 by sec. 3,

ch. 175, of the laws of that year. Therefore it cannot be regarded as having changed in any way the rights of the assured to deal with the particular certificate issued in 1890.

Now we have seen that the assured was competent to change the beneficiary without her consent. There was no written law to the contrary, and the unwritten law gave him such right, subject to the provisions of the insurance contract and the rules and regulations of the society which issued the certificate. There was no provision on the subject in the certificate, nor, so far as we can discover from the evidence, was the matter dealt with by the constitution, by-laws, or regulations of the society. The constitution provided for payment at maturity of the amount mentioned "to such member or members of the family of said deceased or to a person or persons dependent upon said deceased or related to him or her, as he or she may have directed." No particular manner of giving directions was mentioned. Of course, the direction in the certificate would govern in the absence of any other.

There being no proof that the manner of making a change of beneficiaries was prescribed by the constitution, by-laws, or regulations of the corporation, it must be presumed that the assured was left to change the beneficiary within the designated class as he saw fit. *Opitz v. Karel,* 118 Wis. 527, 95 N. W. 948. It is elementary "that where no formalities are required, a change of beneficiaries can be made in any way indicating the intention of the member." 1 Bacon, Ben. Soc. (3d ed.) § 308*a,* and cases cited. The text, supported by the authorities, contains this in effect: Where neither the constitution nor by-laws prescribe any formalities for a change of beneficiary, any definite designation of a different beneficiary will suffice. It may be made by a paper signed by the member, expressing his intention and mailed to the society. "The disposal of the benefits may be made by

the mere direction of the insured." The subject is fully covered in *Masonic Ben. Asso. v. Bunch,* 109 Mo. 560, 19 S. W. 25.

From the foregoing it is considered that the respondent had no vested interest in the certificate which the assured could not control. She had a mere expectancy which could be taken from her by the act of the assured at any time during his life. Therefore the doctrine of *Merrick v. Northwestern Nat. L. Ins. Co.* 124 Wis. 221, 102 N. W. 593, does not apply and the case is ruled in favor of appellant by *Slocum v. Northwestern Nat. L. Ins. Co.* 135 Wis. 288, 115 N. W. 796. Respondent's right is a mere expectancy which she is liable to be deprived of by the act of the assured at any time. That mere expectancy is of such uncertain value as not to form a basis for any assessment of damages.

Thus the difficulty in this case disappears when it is appreciated that the policy of insurance in the *Merrick Case* was issued after sec. 2347, R. S. 1878, was amended by the act of 1891, disabling the assured in such cases from depriving a married woman beneficiary of her interest in an insurance policy without her consent, unless provided otherwise therein. *Christman v. Christman,* 163 Wis. 433, 157 N. W. 1099.

The result is that respondent had no right to maintain this action.

By the Court.—The judgment is reversed, and the cause remanded with directions to dismiss the complaint with costs.

ROHN vs. COOK and another, Respondents, and GREER and another, imp., Appellants.

March 13—April 4, 1917.

Landlord and tenant: "Lease:" Permanent improvements to be made by lessee: Mechanic's lien on interest of lessor: Foreclosure: Pleading: Notice of lien: Rights of all lien claimants to be adjudicated: Cross-complaint unnecessary.

1. A written instrument stating, among other things, that the owners of certain lands (designated as the "lessors") "have demised and leased, and by these presents do hereby demise and lease," said lands to a realty company (designated as the "lessee") for a term of forty-nine years and six months; that the lessee, "in consideration of the execution of this lease" by the lessors, agrees to pay all taxes and assessments on the premises during said term and to pay to the lessor as rent the sum of $12,000 annually, payable quarterly in advance, also to expend not less than $20,000 within thirty months after the making of the lease in remodeling and improving the buildings on the demised premises, to pay to the lessors an additional $10,000 in cash upon the delivery of the lease, to be held as security for the performance of its conditions, and to expend that sum, in addition to the $20,000, in making further permanent improvements before the expiration of the lease; and that if not so expended within said term the balance of said $10,000 remaining at the termination of the lease shall be paid to the lessors "as additional rental,"—is *held* to be a lease creating the conventional relation of landlord and tenant, within the meaning of the provision in sec. 3314, Stats., which, except as therein specified, exempts the interests of the owner of leased land from a mechanic's lien for labor or material furnished at the request of the lessee.
2. That part of sec. 3314, Stats., providing that a lien "shall attach to and be a lien upon the real property of any person upon whose premises such improvements are made, such owner having knowledge thereof and consenting thereto," is not applicable where a lien is expressly forbidden by the terms of said sec. 3314.
3. In an action to enforce a mechanic's lien an allegation in a cross-complaint that "a notice that these defendants had performed work, labor, and services and furnished materials and supplies in the repairs, construction, alteration, and improve-

ments of said building as principal contractors, was served on" the owners of the land "in accordance with sec. 3315 of the" Statutes, is *held*, on demurrer, a sufficient allegation that a notice in compliance with sec. 3315, Stats., was served.

4. The commencement of an action by any lien claimant to foreclose a mechanic's lien within the time limited by sec. 3318, Stats., is sufficient to authorize the court to consider and adjudicate in that action the rights of all lien claimants who are made parties, even though certain of such claimants were not made parties until after the expiration of one year from the date of their last charges for labor or materials furnished.

5. It being unnecessary for such a claimant to file a cross-complaint demanding affirmative relief, it is immaterial that such a cross-complaint fails to show that it was filed and the action commenced in favor of the cross-complainant within one year from the date of the last charge for labor or material furnished.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This action was brought by plaintiff to enforce a mechanic's lien against certain real estate for material furnished, which real estate was owned by the defendant *Harriet M. Cook* and one Sarah A. Holbrook, since deceased, and whose executor, *H. W. Shattuck,* is now one of the defendants.

April 10, 1913, *Harriet M. Cook* and Sarah A. Holbrook, owners of the premises, entered into a contract with the Grand View Realty Company, by the terms of which said company was to have possession of the premises described in the contract for a period of forty-nine years and six months. The action was originally commenced against the owners of the realty, *Harriet M. Cook* and Sarah A. Holbrook, and afterwards the defendants *William H. Greer* and *Ernst P. Butler,* doing business as Wisconsin Mantel & Tile Company, were made parties. Said partners after being made parties defendant served a cross-complaint upon the owners in fee of the property, who demurred to said complaint on the ground (1) that it did not state facts sufficient to constitute a cause

of action, and (2) that the said action was not commenced as to said cross-complainants within the time limited by law, viz. within the time limited by sec. 3318, Stats. The court sustained the demurrer as to the first ground and overruled it as to the second.

The Wisconsin Mantel & Tile Company, cross-complainants, furnished material to the Grand View Realty Company in the performance of the contract of lease made between *Cook* and Holbrook and said Realty Company.

The contention of the cross-complainants is that the instrument which gave to the Grand View Realty Company possession for forty-nine years and six months for a certain consideration named in the agreement was not a lease as contemplated by sec. 3314, Stats., and that under this instrument the conventional relation of landlord and tenant did not exist between the Grand View Realty Company as lessee and the defendant *Cook* and the estate of Holbrook as lessors. It is therefore claimed on behalf of the appellants that the cross-complainants were entitled to a mechanic's lien upon the interest of the lessors, *Cook* and Holbrook, therefore the court erred in sustaining the demurrer to the cross-complaint.

This appeal is from the part of the order sustaining the demurrer of the defendants *Harriet M. Cook* and *H. W. Shattuck* as executor to the cross-complaint of *William H. Greer* and *Ernst P. Butler,* copartners doing business as Wisconsin Mantel & Tile Company.

H. F. Friedrick of Milwaukee, for the appellants.

For the respondents there was a brief by *Frame & Blackstone* of Waukesha, attorneys for *Harriet M. Cook,* and *M. H. Brand* of Milwaukee, attorney for *H. W. Shattuck,* executor; and the cause was argued orally by *A. J. Frame, Jr.*

KERWIN, J. Whether the cross-complaint states a cause of action turns upon the construction of the contract between

Cook and Holbrook and the Realty Company, by which the Realty Company was put in possession of the property for forty-nine years and six months. If this instrument constitutes a lease by which the conventional relation of landlord and tenant was created between the parties, then no lien would attach in favor of the cross-complainants against the lessors upon the allegations of the cross-complaint under the provisions of sec. 3314, Stats., which provides:

"This section shall not be construed as giving a lien upon the interests of any owner in land where the work or labor is done, or material is furnished or plans or specifications or estimates are prepared, at the request of any person holding such land under any contract of lease, demise or contract for the sale thereof, with such owner unless there shall also be an express agreement between such owner and the person doing such work or labor or furnishing such material, or preparing such plans, specifications or estimates whereby such owner has agreed to pay for or become responsible for the payment of the same, but such lien shall affect the interests only of the person holding the land under such contract of lease, demise or sale."

The cross-complaint sets forth at length the terms of this instrument and we are convinced that it is a lease. It designates the owners of the property, *Cook* and Holbrook, as lessors and the Realty Company as lessee, and provides

"That the parties of the first part, for and in consideration of the covenants and agreements hereinafter mentioned to be kept and performed by the said party of the second part, have demised and leased, and by these presents do hereby demise and lease, unto the said party of the second part, all of lot numbered one (1) in block numbered one hundred seventy-six (176) and all of lot numbered one (1) in block numbered sixty-five (65) except the south ninety (90) feet in width thereof, in the Fourth ward of the city of Milwaukee, county of Milwaukee, state of Wisconsin, subject to a right of way over and across the south ten (10) feet in width of said premises hereby demised and leased; together with all and singular the rights, privileges, easements, and appurtenances

to the said premises belonging or in any wise appertaining or therewith usually held and enjoyed.

"To have and to hold the premises hereby demised unto the said party of the second part from the 10th day of April, 1913, for the term of forty-nine (49) years and six (6) months."

The lease then goes on to provide that the lessee, in consideration of the execution of the lease by the lessors, does covenant and agree to pay all taxes and assessments upon the premises, buildings, and improvements during the term and perform every other agreement or promise therein contained, and will pay to said lessors in gold coin of the United States, or any lawful money of the United States, at the option of said lessors, as rent for said premises during the term or period of the lease, $12,000 annually in advance in four equal quarter-yearly instalments, on the 10th day of each of the months of April, July, October, and January. The lease further provides that the lessee will, not later than thirty months after April 10, 1913, expend or lay out in remodeling and improving the buildings on the demised premises for the enhancement of the value thereof not less than $20,000, $10,000 of which shall be expended within one year after April 10, 1913, which amount shall be in addition to any sums required or which may be expended by said lessee in making current repairs for the maintenance and upkeep of the buildings situate upon said premises, and that the work of remodeling and improving said buildings shall be commenced not later than July 10, 1913. The lease further makes provision as to what the work of remodeling shall consist of; that the lessee covenants and agrees to pay to the lessors the sum of $10,000 in cash upon the delivery of the lease, which sum is to remain in the hands of the lessors as security for the covenants contained in the lease and as security for the payment of any rent and for the payment of any sum or sums of money which shall become payable by

the lessee under the terms of the lease, interest at five per cent. to be allowed on said $10,000 while it remains in the hands of the lessors; this $10,000 to be in addition to the said $20,000 agreed to be expended by the lessee above mentioned, making a total of $30,000 to be expended for remodeling and improving the buildings upon the demised premises during the term of the lease; that if the lessee fails to expend said sum of $10,000 within said term, the balance thereof remaining at the termination of the lease for any cause shall be paid to the lessors as additional rental.

It is clear from the terms of the lease that the $20,000 is a part of the rental of the premises in addition to the $12,000 annual payment mentioned therein, and that by the terms of the lease the lessee is permitted and required to pay said additional rental by way of making permanent improvements upon the premises, and further that the $10,000 is to be held by the lessors as security for the performance of the conditions of the lease by the lessee and also to be expended in improving the premises, and, if not so expended, to be held "as additional rental."

The lease further provides at great length the duties and relations existing between the parties, but we shall not further recite them here. It is sufficient to say that we are convinced that the instrument between the parties was a lease and comes squarely within the provision of the statute [sec. 3314] above quoted which exempts the interests of the landlord in such leased property from the operation of a mechanic's lien. There is nothing in the lease which forms any basis for the claim that any money was deposited to secure payment of liens, nor is there any allegation in the cross-complaint of any "express agreement between such owner and the person doing such work or labor or furnishing such material. . . ."

Considerable stress is placed upon sec. 3314, Stats., which provides that a lien shall attach and be a lien upon the real

property of any person upon whose premises improvements are made, "such owner having knowledge thereof and consenting thereto."

True, this statute applies in proper cases, but has no application to a case such as the one set up in the cross-complaint, where a lien is expressly forbidden by the terms of the statute. The history of the mechanics' lien statutes together with the decisions of this court under the statutes show this. *Clark v. North,* 131 Wis. 599, 111 N. W. 681; *Lentz v. Eimermann,* 119 Wis. 492, 97 N. W. 181; *Hart v. Hart,* 117 Wis. 639, 657, 94 N. W. 890; *J. B. Alfree Mfg. Co. v. Henry,* 96 Wis. 327, 71 N. W. 370; *Coorsen v. Ziehl,* 103 Wis. 381, 79 N. W. 562; *Bentley v. Adams,* 92 Wis. 386, 66 N. W. 505; *Cook v. Goodyear,* 79 Wis. 606, 48 N. W. 860; *Heath v. Solles,* 73 Wis. 217, 40 N. W. 804; *North v. La Flesh,* 73 Wis. 520, 41 N. W. 633.

We are of opinion that the cross-complaint states no cause of action, hence the court below was right in sustaining the demurrer thereto.

It is also insisted that the cross-complaint is defective in that there is no proper allegation that a notice was served in compliance with sec. 3315, Stats., and we are asked to determine this question in view of further litigation in the case.

True, the allegation is not specific, but on demurrer and under the liberal rules of pleading which obtain under our practice we are inclined to regard it sufficient. The allegation is "That on January 9, 1915, a notice that these defendants had performed work, labor, and services and furnished materials and supplies in the repairs, construction, alteration, and improvements of said building as principal contractors, was served on defendants *Harriet M. Cook* and Sarah A. Holbrook in accordance with section 3315 of the Revised Statutes of Wisconsin for the year 1913."

We are also asked, in view of the fact that the question will arise in this case on further litigation, whether a party who is

brought in as a defendant and who claims a lien, but has not been made a party until after the expiration of a year from the time of furnishing the material and labor, is barred under the provisions of sec. 3318, Stats.

The contention is that the cross-complaint must show that it was filed and the action commenced in favor of the cross-complainants within one year from the date of the last charge for labor or material furnished, and that the complaint was filed with the clerk of the court within one year from such date. We do not regard the contention tenable. It was not necessary for the defendants doing business as Wisconsin Mantel & Tile Company to set up their cause of action or claim by way of cross-complaint. They were entitled to have it considered, adjudicated, and determined in the action brought by the plaintiff. *Dusick v. Green,* 118 Wis. 240, 95 N. W. 144. Secs. 3321–3326, Stats., regulate proceedings for foreclosure of a mechanic's lien and provide a scheme for equal sharing among lien claimants, and such scheme allows any one or more claimants to bring an action to which all others are to be made parties for the purpose, among other things, of ascertaining the amount of all other liens with which plaintiff must share the proceeds of the property. "The fact that the judgment will award liens to other defendants, and order money paid to them, is only incidental to the granting of full relief to the plaintiff." *Dusick v. Green, supra.*

It is clear that no cross-complaint demanding affirmative relief was necessary, therefore the commencement of the action by plaintiff within the time provided by sec. 3318, Stats., was sufficient to authorize the court to consider and adjudicate the rights of the defendants doing business as Wisconsin Mantel & Tile Company to a lien upon the property in question.

By the Court.—The part of the order appealed from is affirmed with costs, and the cause remanded for further proceedings according to law.

GALST, Respondent, vs. AMERICAN LADDER COMPANY, Appellant.

March 13—April 4, 1917.

Negligence: Injury from defect in step-ladder: Liability of manufacturer: Evidence: Appeal: Motion to vacate judgment and for new trial.

1. To render the manufacturer liable for injuries alleged to have been caused by defective construction of a standard article (in this case a step-ladder) intended for a certain use, it must be shown that it left his hands in a faulty condition.
2. Evidence that, after an accident caused by the spreading of the legs of a step-ladder, a staple which held a heavy cord intended to prevent such spreading was found to be loose, was insufficient to prove that the staple was loose when the ladder left the hands of the manufacturer six months before, there being testimony that such ladders were repeatedly inspected during the process of manufacture and were again carefully inspected before shipment; that the ladder in question had been handled at least five times after shipment before being used; and that no inspection of it had been made by the retail dealer, by the purchaser, or by the workman who had used it, prior to the accident.
3. It appearing in this case that a motion for a new trial, made on the day after judgment had been entered without notice, was treated by the trial court as in effect a motion to vacate the judgment, it is *held* that, under all the circumstances, it should have that effect, so that on the appeal from the judgment the questions raised are properly before the court.

APPEAL from a judgment of the circuit court for Milwaukee county: MARTIN L. LUECK, Judge. *Reversed.*

Action for personal injuries. The complaint alleges that plaintiff was a painter employed by a firm of painters and paperhangers; that the defendant is the manufacturer of a step-ladder known as the Miller step-ladder, designed for the use of painters, calciminers, and paperhangers; that the defendant prior to the day of the accident in February, 1912, sold to Patek Brothers, dealers in Milwaukee, a consignment of Miller step-ladders; that prior to February 11, 1912, Patek Brothers sold to plaintiff's employers some step-ladders, including the one in question; that said step-ladder is con-

structed with four uprights with steps across the front and braces across the back, and the front and back are held together by a piece of heavy cord attached to two staples on the uprights in the rear and running through one of the steps in front, the string being fastened to the staples by a sailor's half-hitch, and that when properly fastened this cord prevents the ladder from spreading; that said ladder was "carelessly, negligently, and imperfectly manufactured in this, that the said rope so attached to said legs was imperfectly, carelessly, and negligently so fastened to one of the legs of said ladder; that it would not and did not prevent the said legs spreading so far apart while the ladder was being used in the manner contemplated for it to be used," which the defendant well knew or ought to have known; that while plaintiff was using the ladder in the manner in which it was intended to be used the legs spread, causing plaintiff to fall, by reason of which he sustained serious injuries.

The defendant alleged that it was engaged in the manufacture of a ladder known as the Miller step-ladder; that all of the ladders manufactured by the defendant were thoroughly tested at the time of manufacture, and that before they were shipped they were again tested, and that no ladders are delivered by the defendant to any of its customers which are not approximately perfect in material and construction. The answer then alleged contributory negligence on the part of the plaintiff and otherwise generally denied the allegations of the complaint.

There was a general verdict in favor of plaintiff for $800. The verdict was returned into court on the 9th of June. On June 13th plaintiff entered judgment on the verdict without notice. On June 14th defendant served its motion for a new trial and for judgment notwithstanding the verdict. The order overruling these motions was entered on July 15th. The notice of entry of judgment was dated July 8th and was not served upon the attorneys for the appellant until July

21st. There was no formal motion to vacate the judgment, but the trial court evidently treated the matter as if such a motion were made, and in disposing of the motions to set aside the verdict and for judgment notwithstanding the verdict the court made the following order:

"It is ordered that the defendant's several motions be and they are hereby denied; and that the judgment entered upon the verdict as returned by the jury stand as and for the judgment in said action."

From such judgment defendant appeals.

For the appellant there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Albert K. Stebbins,* of counsel, all of Milwaukee, and a reply brief and oral argument by *Mr. Stebbins.*

For the respondent there was a brief by *Lehr & Kiefer* and *Gill & Barry,* attorneys, and *Charles S. Thompson,* of counsel, all of Milwaukee, and oral argument by *Mr. Thompson.*

ROSENBERRY, J. The law claimed to be applicable to this case, so far as established by the decisions of this court, is to be found in *Bright v. Barnett & Record Co.* 88 Wis. 299, 60 N. W. 418; *Hasbrouck v. Armour & Co.* 139 Wis. 357, 121 N. W. 157; *Kerwin v. Chippewa S. M. Co.* 163 Wis. 428, 157 N. W. 1101.

Plaintiff does not claim that the step-ladder in question was an article inherently dangerous, but that it was one which by reason of negligent construction was manifestly dangerous when used as it was intended to be used, and that therefore the defendant, who manufactured and delivered the ladder in question without notice of its dangerous character due to its defective construction, is liable to plaintiff, who was injured. In the view that we take of this case it will not be necessary to discuss the law as to the liability of a manufacturer of a standard article intended for a certain use which is dangerous on account of faulty construction.

In any event, in order to make a manufacturer liable, it must appear that the article left the hands of the manufacturer in a faulty condition. There is no claim in this case that the method adopted for preventing the spread of the ladder was not a proper one to be adopted. The condition of the ladder was testified to by two witnesses. The witness Garrow said:

"I looked it all over and called several witnesses to see what the damage was. I found that the rope had slipped from the tie in the staple. I examined the staple and found that it was loose. The hitch had pulled out from the staple. I should say the staple was out a little over a quarter of an inch. The staple, it seems, had not been fastened strong enough and that pulled through."

Blakely, a witness for the defendant, testified:

"On this ladder you can see where the staple was driven down in there by the impression in the wood. *Q.* What have you to say about that staple being down tight now? *A.* It is absolutely in the right place and it was."

It appears that the ladders in question were ordered from the defendant company by Patek Brothers, local dealers, in July, and received by them August 2, 1911, and were delivered by Patek Brothers on February 10, 1912. The testimony on the part of the defendant showed that the ladders were repeatedly inspected during the process of manufacture and prior to shipment were again carefully inspected; that part of the inspection consists in the examination of the rope and staples, and that the present case is the first instance in which the rope or cord had been known to pull through a staple in eight years' experience; and that a ladder found defective was immediately taken out and not shipped to customers.

The ladder in question was handled at least five times after it left defendant's hands before it was used, and it is a matter of common knowledge that the staple might have been loosened by careless handling and in other ways. Under

such circumstances testimony that the staple was loose on the morning of February 10, 1912, comes far short of establishing the fact that the staple was loose at the time it left the hands of the manufacturer in August, 1911. The situation here is quite different than it would be if the defect were a knot, cross-grained or dozy material, or other inherent defects of a similar kind. No inspection was made of the ladder by the retail dealer, by the firm who purchased it, or by the man who used it, prior to the time of the accident. The evidence as a whole tends to establish the fact that there was a change in the condition of the ladder between the time it left the hands of the manufacturer and the time it was used by the plaintiff. Without proof that the ladder was defective when shipped by the manufacturer, plaintiff cannot recover under any theory of the law.

Plaintiff contends that by reason of the failure of the defendant to make a motion to vacate the judgment with a motion to set aside the verdict and grant a new trial the appeal is not properly before this court. *Bailey v. Costello,* 94 Wis. 87, 68 N. W. 663. We think it appears that the trial court treated the motion to set aside the verdict and grant a new trial as in effect a motion to vacate the judgment, and that fact sufficiently appears from the language of the trial court directing that the judgment entered upon the verdict stand as and for the judgment in said action, and that under the circumstances disclosed by this record the questions raised are properly before this court.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

WILL OF BURGHARDT: ARNDT, Executrix, Appellant, vs. BURGHARDT, Respondent.

March 13—April 4, 1917.

Judgments: Validity: Signature of judge not necessary: Foreign judgment of divorce: Evidence: Authentication: Insufficient objection: Enforcement in this state: Allowance for support of child: Death of defendant: Limitation of actions.

1. The judgment of a court of this state is valid without the signature of the trial judge; and in the absence of evidence to the contrary it must be presumed that the law governing such records is the same in Illinois as in this state.
2. Had proper objection been made it would have been error to admit in evidence in a court of this state a document purporting to be a copy of a divorce judgment of an Illinois court, but not authenticated in either of the methods authorized by sec. 4145, Stats.; but, it appearing that counsel objecting to its admission stated that he did not care to press his objection that it was not properly certified, that a letter from the defendant in the divorce action recognizing the existence of the judgment was subsequently received in evidence without objection, and that payments had been made by such defendant in accordance with the terms of the judgment, it was not error to consider the copy of the judgment as properly before the court.
3. Although an Illinois judgment of divorce requiring the husband to pay a weekly sum, not as alimony for the wife, but for the support of a minor child whose custody was awarded to her, did not fix in absolute terms the total amount due or to become due, and could not be docketed as a money judgment enforceable by execution, yet, the husband having since died, so that no modification of the judgment as to such allowance could be made by the Illinois court, and the amount unpaid during his lifetime being a mere matter of computation, the judgment was a proper basis for a claim enforceable in this state against the estate of the husband, who resided here at the time of his death.
4. The statute of limitations—sub. (1), sec. 4221, Stats.—bars a recovery in such case only of the weekly payments which fell due, under the terms of the judgment, ten years or more prior to the death of the defendant in the divorce action.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

The appeal is from a judgment in favor of claimant, *Mrs. Laura Burghardt,* upon appeal from the county court.

A judgment of divorce was entered in Illinois in favor of claimant and against her then husband, William F. Burghardt, by the terms of which she was awarded the custody of the minor child Ella, then two years old, with no provisions for the payment of anything other than an allowance of $2 per week for the support of the child. No further steps were taken by either party in that divorce action subsequent to the judgment.

The defendant paid on this judgment from the time of its entry on February 15, 1897, until October 16, 1898, when he left Illinois and came to Wisconsin, where he resided until his death February 13, 1913. He left $1,000 to the daughter Ella, who has resided with claimant continually. *Mrs. Burghardt* filed a claim against his estate herein for the full amount claimed to be due for alimony from October, 1898, and interest thereon. The claim was allowed for the ten years preceding the death of Burghardt at an amount which was stipulated to be $1,278, and from the judgment for that amount with costs the executrix appeals.

The cause was submitted for the appellant on the brief of *Ernst von Briesen* of Milwaukee, and for the respondent on that of *Litzinger, McGurn & Reid* of Chicago, Illinois, and *Quarles, Spence & Quarles* of Milwaukee.

ESCHWEILER, J. It is contended that the trial court erred in admitting as evidence a document which purported to be a copy of the divorce judgment of the Illinois court. And further, that if such evidence should have been received, then the court erred in holding that the judgment or decree was such as would be recognized or enforced in this state.

The document offered in evidence purports on its face to be a copy of a judgment of the circuit court for Cook county with the seal attached and a certificate of the clerk. At the

time it was offered in evidence appellant's counsel objected to it on the ground that it was incompetent, irrelevant, and immaterial, and not properly certified. The court then asked counsel, "In what respect not properly certified?" to which counsel responded, "I think it lacks certification in that it does not say that the clerk compared it with the original. I do not care to press that. I would like certification." Upon which the court ruled that the same would be received subject to the objection. No further objections appear to have been made or questions raised about the offer during the trial.

The certificate of the clerk to the document offered contained no allegation that such copy had been compared with the original record, in that respect failing to comply with the provisions of sec. 4140, Stats. It had no accompanying certificate from the judge of the Illinois court to the effect that the attestation by the clerk is in due form as required by the laws of the United States. R. S. of U. S. 905 (1 Comp. Stats. 1913, § 1519). So that, on the face of it, it did not comply with the provisions of sec. 4145, Stats., which authorizes these two methods of proof. It was therefore inadmissible as then presented if proper objections thereto had been made. *Hackett v. Bonnell,* 16 Wis. 471; *Halfhill v. Malick,* 145 Wis. 200, 213, 129 N. W. 1086. It is also insisted that it should not have been received in evidence for the reason that there does not appear to have been any signature thereon of the judge who tried the cause. No statutes or decisions of Illinois were offered in evidence, and we must therefore assume that the law governing such records is the same there as in this state. No such signature is necessary in order to have a valid judgment in this state. *Allen v. Voje,* 114 Wis. 1, 89 N. W. 924; *Wallis v. First Nat. Bank,* 155 Wis. 533, 145 N. W. 195.

It further appears from the uncontradicted testimony that payments were made by the defendant in accordance with the terms of this judgment. A letter written by deceased to

claimant was received in evidence without objection, which from its terms might be considered as a recognition of the existence of such judgment. Upon the attitude, therefore, of counsel taken at the time of the offering of this record, and the subsequent evidence and proceedings, we cannot say that it was error to consider the copy of the judgment offered as properly before the court.

It is urged that, being a judgment for weekly payments only and not a determination of any absolute precise amount due, it is not such a judgment as will be enforced or recognized in a sister state, and that before proceedings in this state could properly be had upon the same it would be necessary that proceedings be taken in the Illinois court having original jurisdiction, and alone having the power to modify it, to determine the amount absolutely due.

This court in the case of *Mallette v. Scheerer,* 164 Wis. 415, 160 N. W. 182, holds that divorce judgments from sister states shall be given full faith and credit in this state.

It is true that a distinction is made by some authorities between a judgment decreeing the payment of alimony by instalments and which at the time of their being sued upon in the sister state are still subject to revision by the court of original jurisdiction and therefore not to be enforced beyond the amount determined by the original judgment itself to be then accrued, and judgments fixing in absolute terms the total amount due or to become due. *Page v. Page,* 189 Mass. 85, 75 N. E. 92; *Israel v. Israel,* 148 Fed. 576.

Although the judgment before us is not such a final judgment determining the amount due as was the one in the case of *De Longe v. Fischback,* 153 Wis. 193, 140 N. W. 1125, nor is it in such position that it might be docketed as a money judgment and execution issued to enforce it as suggested in *Staples v. Staples,* 87 Wis. 592, 595, 58 N. W. 1036, and *Renner v. Renner,* 127 Wis. 371, 376, 106 N. W. 846, yet where, as here, the allowance is not in the shape of alimony

for the wife but for the support and care of the minor child, who has been supported and cared for by the mother to whom she was awarded, and where, the husband being dead, further application could not be made to the Illinois court for any modification or change as to the allowance, if any such were proper, it must be held that the amount due being merely a matter of mathematical computation made it such a judgment and decree that it may be enforced against the estate of the deceased as was done in this case in the court below and as was done in the case of *Martin v. Thison's Estate,* 153 Mich. 516, 116 N. W. 1013.

It is further urged that, inasmuch as this judgment of 1897 is relied upon as a foundation for the claim filed herein, it must be barred by the statute of limitations, sub. (1), sec. 4221, which provides that an action upon the judgment or decree of any court of record of a sister state must be commenced within ten years after the cause of action accrued. The court below placed the proper construction upon the statute of limitations by limiting the recovery to such weekly instalments as fell due under the terms of said judgment within the ten years next preceding the death of the defendant in that action. In such a form of judgment the statute of limitations can only commence to run as to the instalments from the times that such respective payments become due under the terms of the judgment. 23 Cyc. 1510; *Gaston v. Gaston,* 114 Cal. 542, 46 Pac. 609; Angell, Lim. sec. 110; *Ulman v. Ulman,* 148 Mich. 353, 111 N. W. 1072.

By the Court.—The judgment of the circuit court is affirmed.

STEIN, Respondent, vs. JASCULCA, Appellant.

March 13—April 4, 1917.

Evidence: Telephone conversations: Competency.

Where one subscriber to a public telephone exchange calls in the usual way the place of business of another subscriber and some one there undertakes to answer and accept the communication, this is *prima facie* evidence that the message was delivered at that place of business to some one authorized to receive it on behalf of the person or firm to whom the telephone was accredited; and the conversation is admissible in evidence, even though the voice of the person to whom the message was delivered was not identified.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

The appeal is from a judgment for plaintiff in the circuit court reversing a judgment of the civil court.

The plaintiff, a furrier, sued defendant for the price of certain furs delivered on October 5, 1915, which had been ordered by telephone. On examination of the goods on the day of their receipt defendant claims to have found them inferior to the sample according to which they were sold and thereupon directed his wife, who had charge of his business in his absence, to telephone the plaintiff to that effect and request the plaintiff's salesman Savitzky, through whom the goods were purchased, to call with reference to them. On the following day defendant's wife called up in the usual manner the plaintiff's place of business over the telephone through the telephone exchange, and in answer to the inquiry if the place so being spoken to was *O. N. Stein's,* received the answer "Yes," then asked for Mr. Savitzky, and was informed by the person answering the telephone that he was out and that she would send him over; and the person at the telephone then inquired if there was anything she could do, and Mrs. Jasculca stated that they had received a shipment

of fur which was inferior, and was then answered to the effect that the person at the telephone could not do anything, but that she would have Mr. Savitzky call as soon as he came in. A few days later Mrs. Jasculca called up again and referred to the message left four or five days before that Mr. Savitzky was to be sent over about the furs, and was informed by the person then answering the telephone that the message must have been overlooked by the person taking the same; that the person now answering the telephone would have Mr. Savitzky go right over to defendant's place of business. About a week or so later the goods were sent by defendant to plaintiff's place of business and refused. It was conceded that Mrs. Jasculca at the time of the telephone conversations did not recognize the voice of the person with whom she had talked and that the second telephone conversation was had with a different person than the first.

Plaintiff's counsel objected to all of the telephone conversations and the civil court sustained the objection. The plaintiff in rebuttal offered the testimony of the bookkeeper to the effect that she received no telephone message from anybody relative to the transaction of October 5th, that she and the stenographer usually answered the telephone and that the stenographer was accustomed to report everything to her, and that no such telephone conversation was ever reported to her. The stenographer was not called as a witness. The goods were not returned to plaintiff until about twenty days after October 5th. The civil court found in favor of the defendant. On appeal to the circuit court the decision of the civil court was reversed and judgment was ordered for the plaintiff upon the ground, as appears in the decision of the circuit court, that the return of the goods was after an unreasonable delay and therefore a confirmation of the sale. Nothing was said in the decision with reference to the telephone communications above specified and it is apparent that the circuit court must have disregarded them.

For the appellant there was a brief by *S. Fred Wetzler,* attorney, and *A. W. Schutz,* of counsel, both of Milwaukee, and oral argument by *Mr. Schutz.*

Robert A. Hess of Milwaukee, for the respondent.

ESCHWEILER, J. If the telephone communications between defendant's wife as his agent with some one at plaintiff's place of business who responded and assumed to answer on plaintiff's behalf, after having been called through the central office by the telephone number belonging to plaintiff, and in the usual manner, should have been received, then there is uncontradicted evidence of a notification by defendant to plaintiff that the goods did not meet the conditions of the sale and an offer to return them, and this would then support the judgment in favor of the defendant rendered in the civil court, and no other of the questions raised need be considered.

There has been some dispute among the authorities as to how far such telephone communications may be received in evidence where there is no proof of the identification by voice at least of the person with whom the communication was had. In the case at bar, where the plaintiff and defendant is each a member of the general public telephone exchange with their respective numbers furnished in the directory, and a call is made, such as here, in the usual manner, by one through the telephone exchange to the place of business of the other party, and some one there undertakes to answer and accept the communication conveyed over the telephone, it must be held to be sufficient *prima facie* evidence that the message was delivered at that place of business to some one authorized to receive the same on behalf of the person or firm to whom the telephone was accredited. Having adopted the telephone with its manifold advantages, it seems a reasonable and salutary rule to hold the users to be subject to its possible disadvantages, such as are urged in opposition to this rule.

This view is supported by many of the recent decisions, among others *Union C. Co. v. Western Union Tel. Co.* 163 Cal. 298, 306, 125 Pac. 242; *Guest v. H. & St. J. R. Co.* 77 Mo. App. 258, 261; *Wolfe v. M. P. R. Co.* 97 Mo. 473, 481, 11 S. W. 49; *Gardner v. Hermann,* 116 Minn. 161, 133 N. W. 558; *Shawyer v. Chamberlain,* 113 Iowa, 742, 84 N. W. 661; *General H. Soc. v. New Haven R. Co.* 79 Conn. 581, 65 Atl. 1065; Jones, Ev. (2d ed.) § 211 (210).

It follows therefrom that the evidence of such conversations should have been received, and, the rebutting evidence having gone no further than to show that one of the two persons denied any such conversation, there still stood as an untradicted fact that some conversation was had with some person in charge of the telephone at plaintiff's office and not called as a witness to dispute that fact.

By the Court.—Judgment of the circuit court reversed, and the action remanded with directions to affirm the judgment of the civil court.

ROSENBERRY, J., dissents.

KUCHLER, Appellant, vs. CITY OF MILWAUKEE, Respondent.

March 13—April 4, 1917.

Appeal: Review: Questions for jury: Highways: Injuries to travelers: What defects actionable: Break in curbstone outside of line of travel.

1. The decision of the circuit court that the evidence in a case does not present a jury question must, on appeal, be regarded as right unless the contrary clearly appears.
2. An imperfection in a highway which is outside of the ordinary course of travel and the place prepared therefor, and not so near thereto or so connected therewith as to render such place not reasonably safe, is not an actionable defect.

3. In an action against a city for injuries to a pedestrian who fell when he stepped or his foot slipped into a break or hole in the curbstone at a point about three and one-half feet distant from the sidewalk and crosswalk prepared for travel, it is *held* that the trial court was not clearly wrong in directing a verdict for defendant on the ground that, in view of its location, the defect in the street was not an actionable one.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action to recover for a personal injury which plaintiff received, as claimed, by reason of an insufficient condition for public travel of a street in defendant city.

The evidence was to this effect: Walnut street, in the city of *Milwaukee,* is an east-and-west thoroughfare. Extending at right angles south therefrom is Fifteenth street. The former is paved with asphalt which extends southerly at the intersection of the streets to the south line of Walnut street so that the crossing from the east to the west side is paved with asphalt. South of the asphalt paving on Fifteenth street there is a macadam pavement. On the south side of Walnut street, at the southwest corner of that and Fifteenth street, there is a cement sidewalk, which, in front of the building at the corner, except for interference by steps at the front door thereof, extends from the curb back to the lot line, a distance of eleven feet. Extending south from this into Fifteenth street, from a point about two and three-quarters feet north of the south line of Walnut street, there is a six-foot-wide sidewalk, making the eleven-foot sidewalk aforesaid extend east on Walnut street to within about five feet and eight inches of the curbstone on Fifteenth street, which is about eleven feet east of the lot line, leaving a space between the curb on such street and the cement sidewalk thereon extending about two and three-quarters feet north of the south line of Walnut street, which is not paved. The earth bed comes up nearly to the top of the cement walk and the top of the curb. The stone is about ten inches high, so

set as to make a round corner at the intersection of the two streets at the corner in question. In the curbstone on Fifteenth street, seven and three-quarters inches south of the south line of Walnut street and about three and one-half feet from the south side of the cement walk in such street there was a piece broken out, leaving a hole in the stone, the width thereof, about seven and three-quarters inches long at the top and five inches at the bottom and three and three-eighths inches deep. It had existed for several months before the accident. If one, in walking west on the crossing to reach the cement walk at the southwest corner of the two streets, kept in line with the south side of such walk, extending west on Walnut street, he would not go nearer to the hole in the curb than about three and one-half feet. Plaintiff, in the daytime, took that course, and was well within the regular traveled way, until he reached a point about two feet from the curbstone when a team, drawing a coal wagon, was driven around the corner into Fifteenth street, so as to cause him to step south of the crossing and to the vicinity of the hole. After the team and wagon passed him he stepped upon the curb to take a course northwesterly across the unpaved area west of it to the cement walk. As he did so, he either stepped into the hole or so close thereto that his foot slipped into it, causing him to lose his balance and fall, breaking his arm and otherwise injuring him.

At the close of the evidence the court directed a verdict in favor of the defendant upon the ground that the hole was of such nature and so located with reference to the course of travel and place prepared therefor as not to constitute an actionable defect. Judgment was rendered accordingly.

Michael Levin of Milwaukee, for the appellant.

For the respondent there was a brief by *Clifton Williams,* city attorney, and *E. L. McIntyre,* first assistant city attorney, and oral argument by *Mr. McIntyre.*

MARSHALL, J. Does it appear from the record, giving due consideration to the decision of the court below, that the evidence did not present a jury question as to whether the defect in the curbstone rendered the street not reasonably safe for travelers on foot? If not, then the judgment must be affirmed.

It is not sufficient to warrant disturbing the judgment for it to appear merely doubtful whether the circuit court reached the right conclusion, nor that, if we were to determine the matter from an original standpoint,—without the aid of such conclusion,—we might reach a different result. Such dignity is to be accorded the opinion of the circuit judge that it must be regarded as right unless the contrary clearly appears. *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Slam v. Lake Superior T. & T. R. Co.* 152 Wis. 426, 140 N. W. 30.

The rule stated has been quite strictly adhered to since it was first formulated. It is now, as it has often been before, restated in order that it may be appreciated that when the trial judge rules, as in this case, the situation cannot be considered on appeal wholly from an original standpoint. Cases are often presented, it is thought, without such appreciation. Therefore frequent reiterations of the rule by which this court must be guided, to the end that appeals with the attendant expense to litigants may be minimized so far as practicable without prejudice to the rights of parties. In the *Slam Case,* in connection with a full review of previous decisions respecting the subject, the court said:

"This court should not disturb the decision merely because, on a doubtful balancing of probabilities, the mind inclines slightly against the decision, but only when the mind is clearly convinced that the conclusion of the trial judge is wrong. It is also considered that this is an entirely reasonable and salutary principle; a principle upon which the court has acted in the past and expects to act in the future; a prin-

ciple which gives due weight and dignity to the decision of the trial judge and demands of him his best and most conscientious service whenever such a question is presented."

From the viewpoint indicated, we will briefly survey the record before us.

No time need be spent discussing the proposition that a public way for travel, which it is the duty of the municipality to maintain in a reasonably safe condition, may not be so and the imperfection consist of some depression, or hole, or an object outside of the region prepared therefor. If the imperfection is so near thereto or connected therewith as to efficiently interfere with the place for travel being reasonably safe therefor, then the way is actionably defective and, if a personal injury is caused thereby to a user thereof, in the exercise of ordinary care, the municipality is liable. *Slivitski v. Wien,* 93 Wis. 460, 67 N. W. 730; *Boltz v. Sullivan,* 101 Wis. 608, 77 N. W. 870.

In cases of this sort, often it is very difficult, especially where the conclusion must be based upon reasonable inferences from undisputed facts, to determine whether there was room in the whole situation for a reasonable controversy as to whether the way was actionably defective or not. Without such controversy there is no jury question, and the court, when appealed to, as was done in this case, must dispose of the matter as one of law. In doing so there is often such a zone of uncertainty as to where judicial interference ends and jury duty begins that the deference due to the trial court's decision renders the rule stated in the opening, often of controlling importance.

The characterizing circumstances of the situation the trial court dealt with, doubtless, to some extent, influenced the result. The place was quite distant from that part of the city where the sidewalks were liable to be much crowded by users. It was in a semi-business part, but where there would reasonably be expected to be ample room on the side and cross walks

for pedestrians, without stepping aside and invading the region occupied by the curbstone where it was wholly outside the place, for the use of footmen. It would be somewhat a stretch of imagination to indulge in the idea that the four-inch depression in the curb could be dangerous to users of the street or crosswalk.

The court relied upon *Snyder v. Superior*, 146 Wis. 671, 132 N. W. 541, as a safe guide to go by. Probably that case as well illustrates the principle that an imperfection in a highway which is outside the ordinary course of travel and the place prepared therefor, and not so close thereto, or connected therewith as to render such place not reasonably safe, is not actionable, as any which can be referred to. Many cases might be cited which deal with the subject in general, each depending, in the ultimate, on its own particular facts. No two could be found which are exactly alike as to facts. To cite and analyze such cases, quoting from opinions, would not materially aid us, if at all. No one goes further than to illustrate the principle stated with reference to the particular facts, without establishing any certain rule for another case involving different facts.

In the *Snyder Case* there was a thirty-inch-wide plank crossing of an alley, connected at the ends with a four-foot plank sidewalk, leaving a space nine inches wide on the outer edge which was filled by a ten-inch plank, inclined at an angle of about thirty-three and one-third degrees, so there was a drop from the sidewalk to such plank at the outer edge of the sidewalk of about four inches. The plaintiff walked near such edge and stepped on to such plank, whereby she fell and was fatally injured. This court held that the trial court correctly decided that the walk was not actionably defective since the drop was not over some two inches in any place where a foot passenger would naturally be expected to travel.

Thus, it will be seen that in the *Snyder Case*, controlling

significance was given to the fact that the drop in the sidewalk was outside the region where a foot passenger would be reasonably expected to travel. Here the defect in the curbstone was not only likewise circumstanced but was so far beyond the sidewalk or crosswalk area that a person could not reach it without departing wholly therefrom. It was so far away from the place for travel that it would not be reasonably expected that one using such place by a mere side step in passing another on the walk, or by a misstep, would reach it. Appellant reached it by taking two or more steps aside from his course of travel, and going some three and a half feet away from the crosswalk and then, instead of returning, attempting to take a cross-cut over the curbstone to reach the sidewalk.

The similarity of the *Snyder Case* to this one is not difficult to see, in that the place of defect was reached by going outside of where one would be reasonably expected to travel. In any event, the defect in the curbstone, under all the circumstances, was quite as inconsequential as the drop from the sidewalk in the *Snyder Case*. Taking the entire situation into consideration we are unable to reach a conclusion that the trial court was clearly wrong in applying the logic of that case and rendering judgment for the defendant upon the ground that the break in the curbstone, in view of its location, did not constitute an actionable defect in the way prepared for public travel.

By the Court.—The judgment is affirmed.

ED. SCHUSTER & CO., INC., Respondent, vs. KURYER PUBLISHING COMPANY, Appellant.

March 13—April 4, 1917.

Contracts: Authority of agent: Ratification: Option to renew advertising contract: Injunction against breach: Equity: Irreparable injury.

1. Even if the advertising manager of the defendant newspaper publishing company had no authority to contract with plaintiff for the publishing of a stated quantity of advertising for a period of three years at a fixed rate, with an option for a two-years renewal, yet, where such contract came to the notice of defendant's business manager within the three years and he, having full authority, failed to disavow it and the defendant continued to receive and publish plaintiff's advertising in accordance with its terms, the contract became binding in its entirety.
2. Defendant having refused to publish plaintiff's advertising after the original three-year period unless plaintiff would agree in advance to pay a higher rate, and it appearing that an irreparable injury to plaintiff would result from such threatened breach of the contract, and that the damages could not be ascertained under any legal rules, defendant was properly restrained from breaching the contract.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

This action is brought in equity to restrain the defendant from breaching the terms of an advertising contract.

The plaintiff is a corporation duly organized and existing under the laws of the state of Wisconsin and operates three department stores. The defendant is also a corporation existing by virtue of the laws of the state and publishes a newspaper in the city of Milwaukee. On or about the 18th of February, 1913, the merchandise manager of the plaintiff and the advertising manager of the defendant contracted as follows:

"We hereby agree to contract with *Ed. Schuster & Co.* to sell you fifteen thousand (15,000) inches or more of space in the Kuryer Polski, to cover three (3) years, beginning

with March 1, 1913, and ending February 28, 1916, at the rate of 18c. per inch, bills to be payable before the 15th of each month following. It is also understood that 5001 inches, or more, are to be used each year. . . .

"The right is hereby granted to *Ed. Schuster & Co.* to renew this contract for another two years, under like conditions and at the same rate."

The contract was executed for three years by the parties. On December 27, 1915, the plaintiff elected to renew the contract under the option contained therein and notified the defendant of such election by mail. It appears that the defendant corporation had a rule that all contracts for advertising for a period of more than one year must be submitted to the business manager of the corporation. At the time of making this contract plaintiff had no knowledge of such a rule of defendant. The contract, however, came to the notice of the business manager of the defendant corporation some time after August 1, 1914, and the defendant continued to furnish advertising to the plaintiff thereafter in accordance with the terms of the agreement and in no way disavowed the contract. After March 1, 1916, the defendant refused to accept and publish the advertisements tendered it by the plaintiff, except upon the condition that the plaintiff would in advance of publication agree to pay a higher rate of advertising than the rate set forth in the original contract.

The circuit court adjudged that the defendant corporation be permanently enjoined and restrained during the continuance of the two years' extension of the contract after March 1, 1916, from refusing to receive and publish the advertising tendered by the plaintiff in compliance with the terms and conditions of such contract. It was also adjudged by the court that the plaintiff recover from the defendant nominal damages and its costs and disbursements of the action. From such judgment this appeal is taken.

For the appellant the cause was submitted on the brief of *Cochems & Wolfe* of Milwaukee.

William Kaumheimer of Milwaukee, for the respondent.

SIEBECKER, J. There is no dispute concerning the terms of the contract as originally agreed upon between the plaintiff's merchandise manager and defendant's advertising manager on February 18, 1913. The court's finding that the "contract came to the notice of said Michael Kruszka, business manager of said defendant, some time after August 1, 1914, and that after it came to his notice the said defendant continued to receive advertising from the said plaintiff in accordance with and pursuant to the terms of the contract and did not disavow the same," is sustained by the evidence and hence cannot be disturbed on appeal as against the clear preponderance of the evidence. In the light of these facts it must be held that the contract became and is a binding obligation on the defendant in its entirety and plaintiff had the right to elect as it did to extend the contract for two years from March 1, 1916. The evidence shows that defendant refused to receive and publish plaintiff's advertisements in its paper, as required by the contract, after March 1, 1916, unless plaintiff agreed in advance to pay a higher rate for this space in defendant's paper which it had sold to the plaintiff under the contract. It is manifest that, had plaintiff complied with defendant's demands in the respect mentioned, plaintiff would thereby have waived its right to recover compensation for the breach of the contract and the right to have the contract specifically enforced. Under such circumstances it was the plaintiff's right to stand upon the terms of the agreement and seek the redress the law affords for defendant's refusal to perform the obligations the contract imposes. The plaintiff asserts that the threatened

breach of the contract would cause it irreparable damage and therefore invoked equitable interposition to prevent defendant from carrying out such threatened breach of the agreement.

The court found, as the evidence establishes, that the damages resulting from such a breach of the agreement, under the peculiar and special nature of the contract, are impossible of ascertainment and hence a legal measure thereof cannot be arrived at to compensate plaintiff in an action at law. Under the facts and circumstances shown by the record it is obvious that if plaintiff is deprived of advertising its business in defendant's paper as specified in the contract the loss thereby occasioned cannot possibly be ascertained within any legal rules and would result in irreparable injury. This state of the case furnishes ample basis for invoking equitable jurisdiction to restrain defendant from committing the threatened breach of the contract. *Langan v. Supreme Council A. L. of H.* 174 N. Y. 266, 66 N. E. 932; *Marble Co. v. Ripley,* 10 Wall. (77 U. S.) 339; *Rolfe v. Burnham,* 110 Mich. 660, 68 N. W. 980; *Inter-Ocean P. Co. v. Associated Press,* 184 Ill. 438, 56 N. E. 822; *Humphryes Mfg. Co. v. David Williams Co.* 70 Misc. 354, 128 N. Y. Supp. 680.

By the Court.—The judgment appealed from is affirmed.

ESCHWEILER, J., took no part.

DONOVAN, by guardian *ad litem*, Appellant, vs. NORTHWESTERN SCHOOL FOR STAMMERERS, Respondent.

March 13—April 4, 1917.

Contracts: Breach: Special damages: Appeal from Milwaukee civil court: New trial, when to be ordered.

1. In an action for breach of a contract by which defendant guaranteed to cure plaintiff of stammering within five weeks or return his tuition fee of $65, the facts that plaintiff was not cured within five weeks and that thereafter, at defendant's request, he continued the treatment for a month or more and then left, having become satisfied that no cure would be effected, did not warrant recovery of any damages beyond the amount of the tuition fee.
2. Upon an appeal from the Milwaukee civil court the circuit court should order a new trial only in case substantial justice cannot otherwise be done. Thus, where plaintiff was entitled, upon the evidence in the civil court, to recover $65 and no more, but had a verdict and judgment in that court for a larger sum, the circuit court should merely have reduced the recovery to $65, and should not have ordered a new trial.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This action was brought in the civil court of Milwaukee county to recover for breach of contract, by the terms of which the defendant, which was conducting a school for stammerers, guaranteed to cure the plaintiff of stammering, and in case of failure to cure to return the tuition fee, $65. The jury returned the following verdict:

"(1) Did the defendant guarantee the plaintiff that he would be cured of stammering? *A.* (by the court by consent of counsel). Yes.

"(2) Did the plaintiff co-operate with the defendant in effecting a cure? *A.* Yes.

"(3) If the court should be of the opinion that plaintiff should recover in this case, at what sum do you assess his damages? *A.* $190."

Judgment was rendered upon the verdict in favor of the plaintiff, and on appeal to the circuit court the judgment

was reversed and a new trial ordered, and the appeal here is from the order granting a new trial.

For the appellant there was a brief by *Raymond J. Cannon,* attorney, and *Bernard V. Brady,* of counsel, both of Milwaukee, and oral argument by *Mr. Cannon.*

For the respondent there was a brief by *Frank H. Hannaford,* attorney, and *Charles S. Thompson,* of counsel, both of Milwaukee, and oral argument by *Mr. Thompson.*

KERWIN, J. It appears from the verdict and undisputed evidence that the defendant guaranteed to cure the plaintiff of stammering within five weeks or return the tuition fee, $65; that the plaintiff diligently co-operated with defendant during that time and the defendant failed to effect a cure. After the expiration of five weeks the plaintiff continued the treatment at the request of the defendant for at least a month and became satisfied that no cure would be effected, and left. The contention of the appellant here is that he should have had judgment upon the verdict, and that the amount allowed by the jury was less than what should have been allowed him, the theory being that he was entitled to pay for his time in addition to the $65 tuition fee guaranteed to be returned in case of failure to cure.

We are convinced from the whole record that there is no basis for any damages beyond the amount of the tuition fee, $65, and that the civil court should have granted judgment for that amount.

On appeal to the circuit court a new trial should be ordered only in cases where substantial justice cannot otherwise be done and the rights of the parties otherwise protected. In the instant case upon the undisputed evidence it was the duty of the circuit court to modify the judgment of the civil court and order judgment for the sum of $65 and costs, and the circuit court was in error in ordering a new trial. *Eder v. Grifka,* 149 Wis. 606, 136 N. W. 154.

By the Court.—The order of the circuit court is reversed, and the cause remanded with directions to the circuit court to modify the judgment of the civil court by reducing the amount of damages to $65 and costs.

ZIMMERMANN, Respondent, vs. MEDNIKOFF and another, Appellants.

March 14—April 4, 1917.

Automobiles: Negligence of driver: Duty to stop when street car is taking on or discharging passengers: Injury to person about to enter car: Contributory negligence: Evidence: Sufficiency: Excessive damages.

1. A person crossing from the curb to enter the rear door of a street car, which was open for the reception or discharge of passengers, had assumed the position of a passenger within the meaning of a city ordinance and sec. 1636—49, Stats., requiring the driver of an automobile to stop when a street car is taking on or discharging passengers.
2. The fact that the driver of an automobile violated the duty to stop imposed upon him by ordinance and statute did not absolve such passenger from his duty to exercise ordinary care for his own safety.
3. A person who was struck by an automobile while crossing from the curb and about to enter the rear door of a street car, which was open to receive him as a passenger, had the right to presume that the driver of such automobile would comply with said statute and ordinance, and hence was not guilty of contributory negligence as a matter of law in attempting to enter the car as he did, even though he had not looked in the direction from which the automobile came.
4. It being undisputed that while the street car was at a full stop, with its rear door open as an invitation to passengers, and while plaintiff was in the act of approaching to enter, an automobile, owned by one defendant and driven by the other as agent of the owner, started from a point of rest and attempted, in violation of the statute and ordinance, to pass the car, and in so doing struck the plaintiff, the trial court properly found that plaintiff's injury was caused by defendants' negligence.

5. **An award of $500 for personal injuries is *held* not excessive, where it appeared on the trial, about six months after the accident, that the injuries to plaintiff's right shoulder had not yet healed, that there was an inflammatory condition in the joint, that the chances were the injury to the shoulder would be permanent and entail suffering for a long time, that it was reasonably certain that a painful injury to his wrist would be permanent, and that he was out of work for a period as a consequence of the injury.**

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

The appeal is from a judgment of the circuit court affirming a judgment of the civil court in favor of plaintiff.

The defendant *Alex Mednikoff* was driving an automobile belonging to his codefendant north on Third street near Cherry street in the city of Milwaukee. The plaintiff, when some distance from Third street, saw a street car standing on Third street going north, and hastened towards it in order to take passage. Another person boarded the car at this point before plaintiff reached the curb. The car was one which had a rear door to be opened for the discharge or reception of passengers and by the closing of which, by an arrangement of electric lights at the other end, the motorman was notified to start ahead, and thus while the door remained opened it indicated that the car was not ready to proceed. While plaintiff was crossing from the curb to the open door in the rear end of the car defendant's automobile started forward from the place where it had stopped just in the rear of the street car, and struck plaintiff just as he was about to enter the street-car door.

It was conceded by plaintiff that as he was crossing toward the street car he did not look in the direction from which the automobile came.

The case was tried in the civil court without a jury, and that court awarded the plaintiff a judgment for $500 damages, which was affirmed upon appeal to the circuit court.

For the appellants there was a brief by *Lehr & Kiefer* of Milwaukee, attorneys, and *J. Elmer Lehr,* of counsel, and oral argument by *J. Elmer Lehr.*

For the respondent there was a brief by *Lorenz & Lorenz,* and oral argument by *Denis J. Regan,* all of Milwaukee.

ESCHWEILER, J. It is contended by appellants that the findings of the civil court are contrary to the clear preponderance of the evidence both on the question of contributory negligence and negligence on the part of the defendant, and that the evidence establishes contributory negligence on plaintiff's part as a matter of law. The civil court found, among other things, that at the time in question, while the rear door of the street car was open for the purpose of receiving the plaintiff as a passenger, the defendant carelessly, negligently, and unlawfully attempted to drive said automobile past the rear door of said street car in violation of the ordinance and statute below quoted, and that in so doing the defendant negligently drove the automobile upon the plaintiff, throwing him to the ground and causing the injuries, some of which were found to be permanent; that the plaintiff acted with due care and was in no wise negligent in the premises.

The plaintiff offered in evidence and relied upon a city ordinance of Milwaukee which provides, so far as material to this case, as follows:

"Section 1247. And every person operating an automobile . . . shall stop whenever it passes a street car which is either taking on or letting off passengers."

He also relied upon sec. 1636—49, Stats., the material parts of which are as follows:

"The operator or driver of any vehicle, when any street car is actually taking on or discharging passengers at the crossings or intersections . . . shall stop . . . until such passengers shall have been taken on or discharged."

Under the testimony in the case the plaintiff had undoubtedly assumed the position of a passenger towards the street car then standing with its open door as an invitation for him to enter. *Karr v. Milwaukee L., H. & T. Co.* 132 Wis. 662, 113 N. W. 62; *Lugner v. Milwaukee E. R. & L. Co.* 146 Wis. 175, 180, 131 N. W. 342.

As to such passenger the defendant owed the duty of stopping, as required by the ordinance and the statute above quoted. This, however, did not absolve the plaintiff from the duty also resting upon him to exercise, under the circumstances, ordinary care for his own safety, and the violation by a driver of such ordinance or statute, or even more stringent ones, would not absolve the plaintiff from that duty. *Ludke v. Burck,* 160 Wis. 440, 152 N. W. 190; *Riggles v. Priest,* 163 Wis. 199, 157 N. W. 755.

In considering this question of contributory negligence of the plaintiff, however, it must be determined under all the circumstances surrounding the situation, and one of those circumstances is that a person so situated has the right to presume that the defendant would comply with the law embodied in the statute and the ordinance requiring such a stop; in other words, that he is not required to anticipate that defendant is about to violate or is violating such provisions. 29 Cyc. 516; *McGourty v. DeMarco,* 200 Mass. 57, 85 N. E. 891; *Baker v. Close,* 204 N. Y. 92, 97 N. E. 501; *Mosso v. E. H. Stanton Co.* 75 Wash. 220, 134 Pac. 941; *Medlin v. Spazier,* 23 Cal. App. 242, 137 Pac. 1078; *Johnson v. Young,* 127 Minn. 462, 149 N. W. 940; *Vesper v. Lavender* (Tex. Civ. App.) 149 S. W. 377.

The trial court was justified, therefore, under the evidence, in finding that the plaintiff was not negligent at the time of the injury.

There is a conflict in the testimony as to the operation of the automobile just preceding and at the time of the accident, but there is no dispute but that the street car was at a full

stop, the car door open as an invitation to passengers, and that the plaintiff was in the act of approaching to enter the car just as the defendant's automobile, starting from a point of rest, attempted to cross the path which plaintiff was taking and which defendant was forbidden by the statute and the ordinance to enter. There was therefore evidence from which the court might properly find that the injury resulted from defendant's negligence.

Complaint is made that the damages are excessive. It appeared on the trial in May, 1916, the accident occurring November 23, 1915, that the injuries plaintiff had received to his right shoulder had not yet healed, that there was an inflammatory condition in the joint, that it was problematical at that time whether the usefulness of the joint would be restored, that the chances were that the injury to the shoulder would be permanent and that he would be apt to suffer for a long time from the injury, that the wrist was injured, with a reasonable certainty that it would be permanently so, and that it was painful and affected by labor. There is also testimony indicating that for a period he was out of work as a consequence of the injury. We cannot say from the record that error was committed in allowing the damages to stand as assessed by the civil court.

By the Court.—Judgment affirmed.

BUBB, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

March 14—April 4, 1917.

Street railways: Injury to person working near track: Contributory negligence.

In an action for injuries to a laborer who was struck by a street car while shoveling dirt into a wagon from a shallow excavation close to the track, upon evidence showing, among other things, that his work did not necessitate his actual entry into the pathway of the car, that he was injured by a car coming from the direction in which he was facing, and that he had an opportunity of looking every time he raised his shovel to the wagon, but never looked more than about a dozen feet in that direction, and in view of the fact that the car was running upon tracks from which it could not deviate and the very presence of which constituted a warning of probable danger, it cannot be said that the trial court was clearly wrong in holding that plaintiff was guilty of contributory negligence as a matter of law. ESCHWEILER, J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Personal injuries. The plaintiff, a laborer employed by a street contractor, was struck on the head by the corner of a street car as he was working in an excavation on the east side of the defendant's track on Third street in the city of Milwaukee and seriously injured. The defendant claimed no negligence on the part of the defendant was shown and that the plaintiff was guilty of contributory negligence.

Third street runs north and south and the defendant maintains two tracks thereon, the easterly track being used by north-bound cars. At the time in question the easterly portion of the street between the east rail of the easterly track and the curb was being excavated by a contracting company by which plaintiff was employed, to a depth of about a foot, preparatory to the construction of a permanent pavement.

A wagon was standing in the excavated portion about three or four feet east of and parallel to the north-bound track, and several men were at work shoveling dirt into the wagon, some being between the wagon and the track, and the plaintiff being at the end of the wagon close to the track. The plaintiff testified that he was obliged to work close to the track; that he had to scrape up the dirt between the ends of the ties with his shovel; that he was facing south as he worked; that each time as he straightened up to throw dirt in the wagon he would look southward down the track ten or twelve or thirteen feet; that there was much noise of teams and automobiles passing; that a minute or so before he was struck a street car went by; that he heard no bell, though he had heard other cars ring the bell; that he bent down and was scraping up between the ends of the ties and made a couple of scraping movements with his shovel, and was hit in the head by a car, after which he knew nothing until he woke up in the hospital. It appears that he was struck by the overhanging right-hand forward corner of the car. Two witnesses who were standing close by the wagon conversing at the time corroborated the plaintiff as to the noise of the street traffic and street cars passing back and forth, and testified that the car was going from fifteen to twenty miles an hour when it struck the plaintiff. One of them followed the car a short distance to the end of the line and notified the motorman of the accident. Neither of the witnesses could remember whether he heard a bell ring or not. The motorman testified that he saw the men working between the wagon and the track; that he rang the bell and passed them slowly at about the rate of five miles an hour; that the men stood up as he approached, and he heard no noise or bump and knew nothing of the accident until he reached the end of the line and was informed of it by the witness just referred to. The plaintiff's injuries were serious.

The court submitted the case to the jury upon a special verdict, but, the jury being unable to agree, the court upon further consideration concluded that the plaintiff was guilty of contributory negligence as matter of law and directed a verdict for the defendant. The plaintiff appeals.

Wm. A. Schroeder and *Horace B. Walmsley,* both of Milwaukee, for the appellant.

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *James D. Shaw.*

WINSLOW, C. J. The trial court recognized the principle laid down in the case of *Turtenwald v. Wis. Lakes I. & C. Co.* 121 Wis. 65, 98 N. W. 948, to the effect that in determining the question of care in such a case as the present it is to be remembered that the situation of the man engaged in labor upon the public street is quite different from that of the traveler upon the street; a principle recently more fully treated in the case of *Dinan v. Chicago & M. E. R. Co.* 164 Wis. 295, 159 N. W. 944. In the latter case it is said that such a man must keep that lookout for cars and vehicles which an ordinarily careful man compelled to be in the street and to be giving attention to his work would keep, and that such care must manifestly be a lesser degree of care than that required of the traveler, who may come and go as he will. In directing a verdict the trial judge said, after referring to the *Turtenwald Case:*

"Important distinctions lie in the fact that the plaintiff's work did not necessitate an actual entry on his part into the pathway of the car; the fact he was injured by a vehicle which was coming from the direction in which vehicles usually come and are expected to come at the point of the accident; the fact that the car was proceeding upon a pathway which was definitely fixed by the course of the street railway tracks from which it could not deviate in order to avoid in-

jury, and that the very presence of those tracks constitutes a warning or admonition of probable danger."

He might have added that the plaintiff in doing his work was facing the south all the time (the direction from which the car came), that he had opportunity to look every time he raised his shovel to the wagon, and that he admits that he never looked more than ten or twelve or thirteen feet towards the south, although there was nothing to prevent him from looking for a long distance.

After careful consideration of the evidence we are unable to say that the trial court was clearly wrong in the conclusion reached, and hence, upon very familiar principles, the judgment cannot be reversed.

By the Court.—Judgment affirmed.

ESCHWEILER, J. (*dissenting*). This case was tried in September, 1916. The case of *Dinan v. Chicago & M. E. R. Co.* 164 Wis. 295, 159 N. W. 944, was not determined until November 14, 1916.

After the case had been submitted to the jury the court below took the case away from the jury and directed judgment for the defendant on the theory that the plaintiff was chargeable as a matter of law with contributory negligence. In differentiating the case at bar from the rule laid down in *Turtenwald v. Wis. Lakes I. & C. Co.* 121 Wis. 65, 98 N. W. 948, the court gave as one reason therefor that the vehicle in this case causing the injury was "upon a pathway which was definitely fixed by the course of the street railway tracks from which it could not deviate in order to avoid injury, and that the very presence of those tracks constitutes a warning or admonition of probable danger."

The *Dinan Case, supra,* disposes of the situation of a person whose work requires him to be upon the highway and in the path of such street cars, which cannot, as in the case of

the wagon in the *Turtenwald Case,* deviate from their path. Had that decision, holding as it did that one lawfully working on the highway and in the path of a street car is not required to keep the same lookout as the traveler unnecessarily driving along the track, been before the trial court, it might well be that the trial court would have held that it was proper for the jury to determine whether or not the plaintiff in this case failed in the ordinary care required of him under the rule recognized in that case. I think both the plaintiff and the court below should have an opportunity to have this case tried and disposed of under the view taken by this court of the respective rights of plaintiff and defendant as indicated in the *Dinan Case.*

PUNG, Respondent, vs. DERSE and others, Appellants.

March 14—April 4, 1917.

Building contracts: Provision for change in materials, etc.: Validity: Taxpayer's action to restrain payments.

1. In a contract for the erection of a school building a clause providing that changes might be made by the school board in the materials, methods of construction, etc., of the building, was a usual and valid provision.
2. Such changes, when they are made in good faith and do not substantially change the character of the building or unreasonably increase its cost, may be legally made without taking the steps required to be taken before letting the original contract. So *held* as to a change from a composition roofing of the tar and gravel type to an asbestos and asphalt built-up roofing.

[3. Whether a taxpayer's action can be maintained to restrain the making of payments on a building contract because of changes made as above stated, where neither the taxpayer nor the municipality suffers any loss, and especially where the action was not commenced until the work was nearly finished, is doubted.]

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

This is a taxpayer's action brought to enjoin the city of *Milwaukee* and its school board from paying for the construction of an asbestos roof placed by the defendant *Holstein* upon a certain school building erected by him under contract with the city. The plaintiff's claim is that the contract for the construction of the asbestos roof was illegal and void because not let as required by the city charter, *i. e.* that plans and specifications were never filed, proposals never asked for, and the contract not let to the lowest bidder.

The facts were not materially in dispute. The school board in January, 1915, duly adopted and filed plans and specifications for certain portions of the school building, including the roof, which was included under the general head of carpenter work. The carpenter work contract was awarded to the defendant *Holstein* after due advertising, and a contract was executed February 8, 1915, by which *Holstein* agreed to do the same according to the plans and specifications on file. According to such plans and specifications the roof surfaces were to be covered with "a composition and built-up roofing material," composed of several thicknesses of tarred felt and a layer of heavy cloth, all saturated with several applications of hot pitch, and finally covered with gravel imbedded in the last coating of pitch. The contract also contained the following provision:

"The board and architects reserve the right at all times to modify, alter, change, or add to any portion of the works or its design. Also to make such changes in the material, method of construction, or in fixtures, apparatus, or machinery as the board and architects may deem advisable and conducive to good construction and durability."

March 19, 1915, and before commencing the building, the contractor, *Holstein,* suggested in writing to the school board that he would like to change the roofing material and put on the building "asbestos and asphalt built-up roofing" manufactured by the defendant the *H. W. Johns-Manville Co.* in-

stead of the composition roofing of the tar and gravel type as stipulated in the contract. No change in the building in other respects was suggested. The letter containing this offer also contains the following reasons for making the change:

"It is not with the idea of substituting a cheaper material that we bring up this matter. This asbestos roofing is built upon the job similar to the tar and gravel type, except that the asbestos requires no gravel or other surface protection. It is purely a mineral felt saturated with Trinidad Lake asphalt (which is also a mineral). The different layers are solidly cemented together with asphalt cement (not tar) and the top receives a surfacing of asphalt coating, thus always presenting a clean and attractive appearance—(free from slag and gravel which clogs gutters, conductors, etc.).

"The insulating properties of asbestos are worthy of your consideration, as this helps to keep the rooms of the top floor cooler in summer. Asbestos roofing is also approved by the national board of fire underwriters.

"You will receive a ten (10) year guaranty on this asbestos asphalt built-up roofing direct from the manufacturer on both material and workmanship. It is not subject to as rapid decomposition and evaporation as the organic types of roofing and you are, therefore, assured of receiving considerable longer life.

"The responsibility of the *Johns-Manville Company* assures us of the best possible kind of jobs. We attach hereto a copy of their roofing specifications."

This offer of substitution was accepted by the school board a few days later and *Holstein* proceeded with the building. The new roofing did not cost any more than the roofing first named in the contract, and it is not claimed by the plaintiff that it is in any way inferior nor that the school directors acted in bad faith in making the change, but simply that they acted illegally.

This action was commenced in September, 1915, at which time the building had been fully inclosed and the defendant

the *Johns-Manville Co.* was laying the roofing on the building.

The trial court found that the contract for the change in the roof was illegal because made without the filing of plans and specifications and without advertising for proposals; and adjudged that the city withhold $2,300 from the contract price of *Holstein's* work upon account of said roofing, and that sum be not paid either to *Holstein* or to the *Johns-Manville Co.;* also that the plaintiff recover his costs of *Holstein* and the *Johns-Manville Co.*

From this judgment all of the defendants appeal.

For the appellants *City of Milwaukee* and the members of the board of school directors (*Derse* and others) there was a brief by *Clifton Williams,* city attorney, and *Chas. W. Babcock,* assistant city attorney, and oral argument by *Mr. Babcock.*

For the appellants *H. W. Johns-Manville Co.* and *August Holstein* there was a brief by *Lenicheck, Robinson & Boesel* of Milwaukee, and oral argument by *Frank T. Boesel.*

Raymond J. Cannon, attorney, and *Bernard V. Brady,* of counsel, both of Milwaukee, for the respondent.

WINSLOW, C. J. It is beyond dispute that the original contract with *Holstein* for the erection of the school building was valid. This being so, it follows that the judgment rendered here was clearly wrong because (1) the clause in the contract providing that changes might be made by the board in the materials, method of construction, etc., of the building was a usual and valid provision (*Mueller v. Eau Claire Co.* 108 Wis. 304, 84 N. W. 430); (2) such changes, when they are made in good faith and do not substantially change the character of the building or unreasonably increase its cost, may be legally made without taking the steps required to be taken before letting the original contract (*Mueller v.*

Eau Claire Co., supra); (3) the change made here is admitted to have been made in good faith, and it neither increased the cost of the building nor in anywise changed its character or efficiency.

We have preferred to dispose of the case on the merits, but we are not to be understood as deciding or intimating that a taxpayer's action can be maintained under such circumstances as are presented here, where neither the taxpayer nor the corporation suffers any loss, and especially when the action was not commenced until the work is nearly finished. That is a question which admits of gravest doubt. *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851; *Ebert v. Langlade Co.* 107 Wis. 569, 83 N. W. 942; *Warden v. Hart,* 162 Wis. 495, 156 N. W. 466.

By the Court.—Judgment reversed, with costs, and action remanded with directions to dismiss the same on the merits. Appellants to tax but one attorney's fee in this court, same to be divided equally.

ALDERSON, Appellant, vs. CARMODY and another, Respondents.

March 15—April 4, 1917.

Trial: Special verdict: Changing findings: Replevin.

Findings in a special verdict in an action of replevin are *held* to be supported by the evidence, and it was error for the trial court to change them.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

This was an action of replevin for a two-year-old steer brought in justice's court, which resulted in judgment that the plaintiff and appellant was entitled to possession of the property, that the defendants unjustly took and detained the

same, and that the damage was $1. Judgment was entered accordingly, from which an appeal was taken to the circuit court, where the action was tried and the jury returned the following verdict:

"(1) Was the steer that the defendants drove away from the cattle of the plaintiff upon the 6th day of October last the steer of the plaintiff, *Alderson?* *A.* Yes.

"(2) Was the steer that the sheriff took possession of under the writ in this action and placed in the custody of James Carmody and took a receipt therefor from him, the same steer that the sheriff subsequently, on October 18th, took from James Carmody's possession and gave to him a receipt therefor? *A.* No.

"(3) Was the steer that the sheriff on October 18th took from James Carmody and proffered to the plaintiff as his, the same steer that the sheriff had on October 8th replevied in this case? *A.* No."

The plaintiff moved for judgment on the verdict and the defendants moved that the court change the answer to the first question to "No" and the answers to the second and third questions to "Yes," and for judgment on the verdict as so amended. The plaintiff's motion for judgment was denied and the defendants' motion granted.

Judgment was entered accordingly in favor of the defendants, from which this appeal was taken.

Frank C. Meyer and *Harry E. Carthew,* both of Lancaster, for the appellant.

For the respondents there was a brief by *Cleary & Cleary* of Platteville, and oral argument by *T. L. Cleary.*

KERWIN, J. The only question necessary to consider upon this appeal is whether the verdict was supported by the evidence. If it was, the court below was in error in changing the answers of the jury and in awarding judgment to the defendants. Careful examination of the evidence convinces us that there was ample evidence to support the verdict, and

that the court below committed error in changing the answers in the special verdict and denying the plaintiff's motion for judgment upon the verdict as returned by the jury.

By the Court.—The judgment of the court below is reversed, and the action remanded with instructions to reinstate the answers in the special verdict as found by the jury, and render judgment for the plaintiff with costs.

LAUGHNAN, Respondent, vs. ESTATE OF LAUGHNAN, Appellant.

March 15—April 4, 1917.

Statute of frauds: Oral promise to devise land: Parent and child: Recovery for services: Executors and administrators: Claim against decedent: Limitation of actions: Appeal: Findings of fact.

1. **An oral promise by a father to devise a part of his farm to his son or to die intestate if the son, after becoming of age, would continue to work for him on the farm, was void under the statute of frauds (sec. 2304, Stats.); but proof of such promise rebuts the presumption that the services performed by the son were gratuitous, and the promise is a sufficient basis for the recovery of their reasonable value.**
2. **It appearing in such case that the services rendered by the son continued from 1880 up to the death of the father in 1913; that payments were made to the son from time to time in money and during all the time in board and keep; and that a claim for such services was seasonably filed against the father's estate, the statute of limitations does not apply.**
3. **The lack of a specific finding by the trial court of a fact shown by uncontradicted evidence to exist will, when necessary, be supplied by the supreme court on appeal.**

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Action to recover the reasonable value of services rendered John Laughnan, deceased, the father of plaintiff, from 1883 to 1893, which services it is alleged were rendered upon an

express agreement made between the deceased and plaintiff that the latter should be compensated therefor at the father's death. John Laughnan died testate January 9, 1913, at the age of ninety-four, leaving plaintiff only $500 out of an estate valued at about $4,500. The circuit court found that an express agreement to pay for the services was made by the deceased; that they were reasonably worth the sum of $2,000; that plaintiff had been paid from time to time the sum of $300, and this sum together with the amount of the legacy of $500 to plaintiff were deducted, leaving a balance of $1,200 due plaintiff, for which sum judgment was entered in his favor. The executrix of the estate appealed.

For the appellant there was a brief by *Thomas W. King* of Spring Green and *Fiedler & Fiedler* of Mineral Point, and oral argument by *Mr. King* and *Mr. E. C. Fiedler.*

For the respondent there was a brief by *Jas. E. O'Neill* of Dodgeville, attorney, and *Gilbert & Ela* of Madison, of counsel, and oral argument by *Frank L. Gilbert.*

VINJE, J. For many years prior to his death John Laughnan lived on a farm of 508 acres in Iowa county. He had two sons, plaintiff, born in 1859, and William, born in 1863, and one daughter, *Mary,* the executrix of the estate and the residuary legatee. His wife, Margaret, died in 1914 at the age of eighty-six or eighty-seven. About the year 1888 he deeded 160 acres to his son William, who then married. *Mary* married and left the farm about 1893, leaving plaintiff and his parents on the farm. In 1898 William bought the old homestead, consisting of 240 acres, his parents reserving a life lease of the home and buildings. The balance of the farm, consisting of 108 acres of ridge land, some twenty-five or thirty acres of which was cleared, the father owned and kept till he died. The plaintiff remained with his parents till they died. It appears that some thirty years ago, while working on the farm, plaintiff through a kick from a

horse sustained an injury to his head which affected his mind so that he is now and for some fifteen years past has been somewhat mentally deficient.

The testimony supporting the finding that an express promise to pay for the services was made is that of the brother William, who testified in substance that after he and plaintiff became of age he told his father that he wanted wages or he would quit working, and that his father told him and his brother that they were not working for him, the father, but for themselves; that when he was through with the property they, meaning William, plaintiff, and his sister, would have the whole of it. He used to say that very frequently, and plaintiff was present when the first conversation was had and at several others. He repeatedly told them that if they stayed and worked the farm as long as he lived they would have the whole of it, meaning the property he owned. At that time the property consisted mainly of the farm.

The defendant contends (1) that there is not sufficient evidence to sustain the court's finding that there was an agreement to compensate plaintiff for his services upon the death of the deceased; (2) that at best the evidence tends to establish only an oral contract to devise real estate, and that such contract is void; and (3) that if an implied contract to compensate for the services is relied upon it is barred by the statute of limitations. Plaintiff claims that the finding that there was an agreement to pay the reasonable value of his services at the death of his father is sustained by the evidence, and, that being so, the statute of limitations does not apply because the payment did not become due till 1913 upon the death of his father.

A careful consideration of the evidence convinces us that the father expressly orally agreed that if plaintiff would continue to work for him after he became of age he would either devise him a portion of the farm or else he would die

intestate and permit plaintiff, together with his brother and sister, to take the farm under the laws of descent. Such a promise, not being in writing, was void under the statute of frauds. Sec. 2304, Stats. 1915; *Taylor v. Thieman,* 132 Wis. 38, 111 N. W. 229. But the establishment of the promise rebuts the presumption that the services were gratuitous, and the express promise, having been satisfactorily proved, constitutes a sufficient basis for a recovery of the reasonable value of the services. For the void promise to devise real estate or die intestate as a consideration for the services the law substitutes the valid promise to pay their reasonable value. *Taylor v. Thieman,* 132 Wis. 38, 111 N. W. 229; *Voss v. Voss,* 134 Wis. 52, 113 N. W. 1097.

In this case the court did not expressly find the value of plaintiff's services after 1895, but it is undisputed that he continued to render services for his father until his death in 1913, and the evidence shows that after 1895 they were at least worth his board and keep.

The lack of a specific finding of a fact shown by uncontradicted evidence to exist will, when necessary, be supplied by this court. So we have a case where services were rendered from 1880 to 1913, payments being made from time to time in money in small amounts and during all the time in board and keep. In such a case, where the services continue to the death of the promisor and a claim therefor is seasonably filed against the estate, the statute of limitations does not apply. *Estate of Kessler,* 87 Wis. 660, 59 N. W. 129; *Taylor v. Thieman,* 132 Wis. 38, 111 N. W. 229.

By the Court.—Judgment affirmed.

LACEY, Appellant, vs. ESTATE OF HANRAHAN, Respondent.

March 15—April 4, 1917.

Executors and administrators: Claim against decedent: Loan or payment? Evidence: Competency: Contents of letter: Attorney as witness: Admissions: Statements by claimant's wife.

1. In an action based upon a claim against a decedent for money paid to him during his life, the question being whether it was a loan to him or a payment on account of an interest retained by him in a mortgage which he had assigned to his daughter (plaintiff's wife), an attorney who, acting merely as a scrivener, wrote a letter for the deceased to the plaintiff relative to the matter, was properly permitted to testify on behalf of defendant to the contents of such letter, but should not have been permitted to testify as to statements made to him by the deceased at that time.
2. It appearing that the assignment of the mortgage to plaintiff's wife was absolute, the burden was upon defendant to show that the deceased had reserved an interest therein; and that fact could be established in this case only by competent evidence that plaintiff had in some way acknowledged such a claim.
3. In such a case, statements made by plaintiff's wife to a third person, without his knowledge or authority, did not tend to establish any admission on his part; and statements made by the deceased and not brought home to the plaintiff were equally incompetent and inadmissible.

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

The proceeding was begun by plaintiff, who filed a claim in the county court of Iowa county against the estate of John Hanrahan, Sr., deceased. Judgment was rendered in the county court in favor of the plaintiff and defendant appealed to the circuit court. In circuit court defendant had judgment and plaintiff brings this appeal.

For the appellant there was a brief by *Fiedler & Fiedler* of Mineral Point, and oral argument by *E. C. Fiedler.*

Platt Whitman of Highland, for the respondent.

ROSENBERRY, J. The question was whether the deceased, Hanrahan, retained any interest in certain moneys derived

from the sale of a mortgage which he conveyed to the wife of the plaintiff, she being the daughter of Hanrahan, during the winter of 1914–1915. Plaintiff claimed that he paid to the deceased $450, which was a loan and was to be repaid by Hanrahan in March, 1915, and made a claim against the estate accordingly. The claim of the defendant was that the money so paid by the plaintiff to Hanrahan was the property of Hanrahan, being an interest reserved by Hanrahan out of the mortgage given to his daughter.

It appeared by the evidence that in the winter of 1914–1915 the said Hanrahan visited the plaintiff and his wife, the daughter of the deceased, at their home in Iowa, and at that time assigned absolutely to the plaintiff's wife a mortgage for $3,000. She sold the mortgage, and the proceeds thereof were turned over to the plaintiff, her husband, and used by him in building a new home, this being the use for which the money was intended. In the spring of 1915 said Hanrahan went to Arthur Egan, Esq., an attorney at law, and requested Egan to write a letter for him, it appearing that Hanrahan could not write. Mr. Egan testified:

"Well, he told me that he had purchased a monument for his wife and he told me he had left $3,500 with Mr. and Mrs. Lacey, and he asked them to send him $500 of that $3,500, and he could keep the balance, they could keep the balance."

Lacey admitted having received a letter written by Egan asking for $450 or $500, but said that he made no response to it and sent no money. About ten days or two weeks later Hanrahan went to Mrs. Imhoff, a neighbor, and asked her to write another letter, which she says she addressed to plaintiff. This letter being lost, Mrs. Imhoff was permitted to testify to its contents and to testify to a conversation had between her and Hanrahan. She finally testified that the contents of the letter were as follows: "You keep the $2,500 I gave you, but send the $500. Send me my five hundred at once for I need the money, and to send it in care of Patrick Mc-

Cormick." Plaintiff claims that the letter was addressed to his wife, and that in addition to asking for money it contained a promise that Hanrahan would repay it the following March, and that in response to the second letter he sent a draft for $450 to the deceased, Hanrahan, in care of Mrs. Patrick McCormick. It appeared without dispute that before the money was received Hanrahan requested another son-in-law, Mr. Dolan, to go to Iowa for him for the purpose of securing a loan from plaintiff, and that to enable Mr. Dolan to make the trip he went to the home of Mr. Dolan and stayed with his family while he was gone. When Mr. Dolan arrived in Iowa, however, he found that the money had just been sent.

There is some dispute as to who wrote the letter inclosing the draft for $450 sent to Hanrahan. But Mrs. Lacey, without any authority from her husband, at or about the time the draft was sent, wrote another letter to Mrs. McCormick, and against the very vigorous objection of plaintiff's attorneys Mrs. McCormick was permitted to testify as to the contents of this letter, which, after much difficulty, was stated by the witness to be as follows:

"She says [meaning Mrs. Lacey], 'I am sending $450 to Pa, and that was money that he gave to me. That was money that he gave to me and now he wants to take it back—he is taking it back again. I wouldn't care if he paid it for the tombstone as he says he wants it—wants to do, but you know where it will go as well as I do.' "

The case was submitted to the jury practically without instruction, and the jury found that the $450 represented by the draft was the money of the deceased, Hanrahan, and defendant had judgment accordingly.

The error complained of relates to the testimony of Arthur Egan, which was claimed to be privileged. We think it clearly appears from the testimony that Mr. Egan acted merely as a scrivener and not as an attorney and that he was

correctly permitted to testify as to the contents of the letter, and that his testimony should be strictly confined to that and not to statements made to him by the deceased, Hanrahan.

It is said that the testimony of Mrs. McCormick as to the contents of the letter received by her from Mrs. Lacey was incompetent. We think this contention is correct. It appeared without dispute that the assignment of the mortgage to Mrs. Lacey was absolute. Therefore the burden was upon the defendant to establish by a preponderance of the evidence the fact that the deceased, Hanrahan, reserved some interest in the mortgage assigned to the daughter. The evidence as to that fact was at best very meager and the statements made by Mrs. Lacey might well have been considered by the jury as an admission binding upon plaintiff, and therefore we think the reception of this testimony was erroneous and prejudicial as to the plaintiff. The fact that the deceased, Hanrahan, retained some interest in the mortgage or its proceeds could only be established by competent evidence to the effect that plaintiff had in some way acknowledged such a claim. Statements made by plaintiff's wife to a third party, without his knowledge or authority, do not tend to establish any admission on the part of plaintiff. Statements made by Hanrahan and not brought home to plaintiff are equally incompetent and not admissible.

By the Court.—Judgment reversed, and cause remanded for a new trial.

DRING, Appellant, vs. MAINWARING and others, Appellants.

March 15—April 4, 1917.

Courts: Jurisdiction: Iowa county court: Action to restrain opening of highway.

An action to restrain town supervisors from removing a fence and opening a highway upon lands occupied by plaintiff not being within any of the classes of cases specified in ch. 339, Laws 1915, the county court of Iowa county had no jurisdiction to enter any judgment or to take any proceeding therein other than to remove the cause to some court having jurisdiction, as provided in sec. 2836*a*, Stats.

APPEAL from a judgment of the county court of Iowa county: GEORGE CLEMENTSON, Judge. *Dismissed.*

The appeal is from so much of a judgment of the county court as refused plaintiff his costs.

J. P. Smelker of Dodgeville, for the appellant.

For the respondents *John Mainwaring, Thomas Stapleton,* and *Henry Crook,* supervisors of the town of Wyoming, there was a brief by *Fiedler & Fiedler* of Mineral Point, and oral argument by *E. C. Fiedler.*

For the respondent *David Walker* there was a brief by *James E. O'Neill* of Dodgeville, attorney, and *Gilbert & Ela* of Madison, of counsel, and oral argument by *Frank L. Gilbert.*

ESCHWEILER, J. After proceedings had been had to discontinue an old highway and lay out a proposed new one over lands now occupied by the plaintiff, a *mandamus* proceeding was instituted by the defendant *Walker* to compel the town board to proceed to open such new highway. Thereafter plaintiff commenced this action in the county court of Iowa county to enjoin and restrain the defendant supervisors from removing a fence and from opening such highway upon the lands so occupied by him. The defendant supervisors inter-

posed no answer, and then the defendant *David Walker* applied for and obtained permission to be made a party and contested the issues with the plaintiff. The case was tried before the judge of the circuit court for Iowa county, who was called in by the county judge. Judgment was entered granting plaintiff the relief he prayed for, namely, declaring that the proceedings as to the highway were null and void from loss of jurisdiction thereover by the town board, but adjudging that no costs should be given to either party as against the other.

The record in this case discloses that the equitable action so sought to be maintained does not come within any of the five classes of cases over which the county court of Iowa county has jurisdiction under the statute creating it, as was determined in the recent case of *State ex rel. Owen v. Reisen*, 164 Wis. 123, 159 N. W. 747.

This being so, the county court had no jurisdiction to enter any judgment or to take any proceedings other than those authorized under sec. 2836*a*, Stats., requiring such court to remove the cause to some court having jurisdiction.

An examination of the record satisfies us that there was no good reason apparent why the general rule giving to the prevailing party his costs should have been departed from so far as to deny the plaintiff his right to costs against the defendant *Walker*.

By the Court.—Appeal dismissed for want of jurisdiction in the county court, and the record remanded to that court with directions to remove the cause to some court having jurisdiction. No costs allowed in this court to either party other than that the clerk's fees be paid by the plaintiff.

SMELKER, Appellant, vs. CAMPBELL and others, Respondents.

SAME, Respondent, vs. SAME, Appellants.

March 15—April 4, 1917.

Courts: Jurisdiction: Iowa county court: Municipal corporations: Adoption of part of general charter: Defect in procedure, when cured: Officers: Salaries.

1. The county court of Iowa county had jurisdiction, under ch. 339, Laws 1915, of a taxpayer's action whose primary purpose was to recover on behalf of a city sums alleged to have been unlawfully paid as salaries, although an injunction against future payments was also prayed for. [Whether that court had power to grant such injunctional relief, is not determined.]
2. Although a city ordinance adopting certain provisions of the general charter law was not passed by a three-fourths vote of all the councilmen, as required by sec. 926, Stats., yet, the city and its officers having thereafter acted in good faith under said provisions, and no action calling in question the validity of the ordinance having been brought within the three months limited by sec. 926*a*, the defect in procedure was cured.
3. Subch. V, ch. 40*a*, Stats. (secs. 925—22 to 925—36), covering many different though nearly related subjects, is not to be considered as a complete scheme which must be adopted by a city in its entirety. Thus, an ordinance adopting all of the subchapter except secs. 925—25 and 925—28, relating to the methods of electing city officers and the time of the commencement of their terms, was not invalid because of such exception—those matters being fully provided for in the special charter of the city in a way not inconsistent with the sections adopted.

APPEALS from a judgment of the county court of Iowa county: ALDRO JENKS, Judge. *Reversed.*

This is a taxpayer's action brought by the plaintiff on behalf of the city of *Dodgeville* to recover from the mayor and members of the common council of the city the amounts paid to them respectively as salaries during the years 1914 and 1915, also to enjoin all such payments in the future, on the ground that they were not authorized by law.

The action was brought in the county court of Iowa county and was tried by the court. It appeared that the city of *Dodgeville* was originally organized under a special charter (ch. 216, Laws 1889). This charter contained a provision forbidding the payment of salaries to the mayor and councilmen. The city council was composed of ten members. At a meeting of the council held in May, 1906, the council in form passed an ordinance in terms adopting certain provisions of the general city charter law, viz. secs. 925—23 to 925—36 of the Statutes of 1898, excepting secs. 925—25 and 925—28. One of the sections so adopted authorized the fixing and payment of salaries to all city officers and employees. The proposed ordinance was published for three weeks prior to its passage, as required by the statute, but the meeting at which it was attempted to be passed was attended by seven councilmen only, while the statute (sec. 926, Stats.) makes a three-fourths vote of all the members of the council-elect an essential to the passage of such an ordinance. Thereafter the city and its officers acted under its provisions in good faith, believing them to have been legally adopted. In February, 1913, the council passed an ordinance providing that the mayor of the city should receive a salary of $50 a year and that the members of the council should receive as compensation for their services $2 for each meeting attended. This last named ordinance was within the power of the council if the sections from the general charter attempted to be adopted by the ordinance of 1906 had in fact become part of the charter of the city, otherwise not. The sums sued for in this action were received by the defendants in good faith believing themselves justly and legally entitled thereto.

The trial court found that the provisions of the general city charter aforesaid were never legally adopted by the city by reason of the omission of secs. 925—25 and 925—28 therefrom; that the provisions of the ordinance of 1913 pro-

viding for salaries were invalid because in conflict with the city charter; that the salaries complained of were illegally paid, but under the circumstances no decree should be entered for their repayment, but that a permanent injunction against the payment of such salaries in the future should be rendered, and that plaintiff should recover costs. Judgment in accordance with this finding having been entered, both parties appealed.

For the plaintiff there were briefs by *Blaine & Kemp* of Boscobel and *J. P. Smelker* of Dodgeville *in pro. per.*, and oral argument by *Mr. H. E. G. Kemp* and *Mr. Smelker.*

James D. McGeever of Dodgeville and *Platt Whitman* of Highland, for the defendants.

WINSLOW, C. J. Upon the defendants' appeal it is urged that the county court had no jurisdiction of the subject matter of this action. The statute conferring civil jurisdiction on this court is ch. 339, Laws 1915, and the particular section in question will be found printed in the case of *State ex rel. Owen v. Reisen,* 164 Wis. 123, 159 N. W. 747, where it was held that its jurisdiction did not extend to an action in equity to enjoin a public nuisance. Under this ruling it may well be that, if this action had been brought simply to enjoin the city from paying any salaries in the future, it would not be within the jurisdiction granted to the county court. The primary object of the action, however, as shown by the demand for judgment, was to recover on behalf of the city the sums already paid out, and enforce their repayment to the city. An action brought for this purpose is certainly included within the words "all civil actions . . . in law and in equity . . . for all claims, demands and sums . . . not exceeding the sum or value of twenty-five thousand dollars." The county court having jurisdiction to determine this claim, it becomes unnecessary to determine whether it had power to grant injunctional relief or not.

Upon the merits of the case we think the judgment must be reversed. It is clear that all mere defects of procedure in the passage of the ordinance have been cured by sec. 926*a*, Stats., providing in effect that any such question may be tested by *certiorari* action brought within three months after the adoption of the ordinance, but not thereafter. This seems also to have been the conclusion of the trial judge, but he concluded further that the council, by leaving out two sections, had failed to adopt an entire plan covering a given subject, but only an incomplete fragment, and hence that the attempt had failed. *Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869; *State ex rel. Boycott v. Mayor, etc.* 107 Wis. 654, 84 N. W. 242. In this we think the trial court was in error. Secs. 925—22 to 925—36 of the general charter law form subch. V of the general charter law (ch. 40*a*, Stats. 1915). The sections cover many subjects, such as the number and names of city officers, the manner of their election, their term of office, the eligibility of citizens to office, the fixing of salaries, filling of vacancies, term of office, removal from office, and other provisions. The subchapter cannot be logically considered as a complete scheme from which nothing can be taken without destroying the legislative purpose; it is rather a chapter containing sections covering many different though nearly related subjects. The two sections which were omitted by the ordinance of adoption were sections relating to the methods of electing city officers and the time of the commencement of their terms of office. These subjects were both fully provided for in somewhat different ways by the special charter of the city. There is no inconsistency between the provisions of the special charter covering these subjects and the provisions of the general charter which were adopted by the ordinance. They can stand together harmoniously and without hiatus. Under these circumstances the rule of the cases cited above has no application. The city had power to adopt the sections which it attempted to

adopt, and they are now a part of the charter, superseding such parts of the special charter as are in conflict with them.

These considerations dispose of the case and obviate the consideration of any further questions.

By the Court.—Judgment reversed on both appeals, and action remanded with directions to dismiss the complaint on the merits. Defendants to tax one bill of costs.

ARBUTHNOT, Appellant, vs. KELLEY and another, Respondents.

March 15—April 4, 1917.

Officers: Malfeasance: Sale by town chairman to town: Recovery of money paid: Laches.

1. The sale to a town by its chairman of articles of merchandise needed and used by it was a violation of sec. 4549, Stats., even though it saved the town considerable inconvenience and was made in good faith and without solicitation on the part of the seller and none of the articles sold has been or can be returned.
2. A taxpayer's action for the recovery of the money paid on such a sale cannot be successfully defended against on the ground of laches, short of the statutory limitation.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Taxpayer's action based on facts, in effect as follows: In 1914 defendant *Kelley,* while chairman of the board of supervisors of the defendant town, sold thereto various articles of merchandise and received, about December 1, 1914, out of its treasury, $434.25 as payment therefor. The town needed the property thus acquired and the same was used to satisfy such need. It could not otherwise have obtained such property of any other dealer therein nor of any outside thereof without considerable inconvenience. The transactions with *Kelley* on behalf of the town were by its agents and without solicitation by him. The sales were known to the taxpayers.

May 17, 1915, plaintiff, a taxpayer of the town, demanded of its town board the commencement of an action to recover back the money paid to *Kelley*. It neglected to do so. The matter was not submitted to the electors of the town. No part of the material purchased of him has been or can be returned. September 13, 1915, this action was commenced.

On such facts judgment was rendered against plaintiff upon the ground that no violation of sec. 4549, Stats., was shown and the ground that he was barred by laches from prosecuting the action.

The cause was submitted for the appellant on the brief of *Graves & Earll* of Prairie du Chien, and for the respondent *Kelley* on briefs by *Geo. B. Clementson* of Lancaster.

MARSHALL, J. Did the circuit court err in holding that *Kelley* did not violate sec. 4549, Stats.? That must be answered in the affirmative, because the statute expressly makes such a transaction as he was guilty of a criminal offense. In *Menasha W. W. Co. v. Winter,* 159 Wis. 437, 150 N. W. 526, the court dealt with substantially such a matter and held that the transaction was "directly within the condemnation of the statute and the contract absolutely void."

Was appellant guilty of fatal laches, barring him from prosecuting the action? That is ruled in the negative by *Milwaukee v. Reiff,* 157 Wis. 226, 146 N. W. 1130. It was there held that an action to recover money paid out of the public treasury in violation of law cannot be successfully defended against on the ground of laches, within the equitable doctrine of *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798. Such is the doctrine invoked by respondent here and which the circuit court supposed was applicable.

There cannot be such a thing as excusable violation of a criminal statute, such as the one involved here, on the ground of good faith or fatal laches, short of the limitation of the

written law, as to remedies for the wrong. If good faith, or mere delay, as in this case, in resorting to a remedy, could be invoked to, in effect, change the title to money illegally obtained from a municipality therefrom to the wrongdoer, the legislative policy embodied in the written law could be easily set at naught by judicial administration. The remedy invoked here, while of an equitable nature, as regards appellant, is to enforce a legal liability to the town. The wrong which afforded appellant such a remedy, was the failure of the public officers to perform their duty.

By the Court.—The judgment is reversed, and the cause remanded for judgment in favor of the plaintiff and against defendant *Kelley* for the benefit of the defendant town for $434.25 with interest thereon from the 1st day of December, 1914, and for judgment against said *Kelley* for plaintiff's benefit for the costs and disbursements of the action. Costs in this court are awarded to appellant against said *Kelley*.

HALL, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

March 16—April 4, 1917.

Marriage: Validity: Lex loci: Divorce: Evasion of statute and judgment prohibiting remarriage: Public policy: Status of persons, fixed by judgment: Recognition in other states: Workmen's compensation: Dependents: "Wife:" "Member of the family."

1. The general rule that a marriage valid where solemnized is valid everywhere has its exceptions where unusual circumstances would render its application inequitable or contrary to a declared public policy or to good morals.
2. It is the public policy of this state, declared in sec. 2330*m*, Stats. 1915, that marriages contracted without the state by residents hereof not qualified to marry within the state, and marriages contracted within the state by nonresidents not qualified to marry in their own state, shall be null and void.
3. The law of Illinois forbidding divorced persons to marry again within one year being substantially the same as the law in this

state and having received the same construction—to the effect that marriages contracted without the state to evade the statute are void,—the courts of this state will take cognizance of an evasion and infraction of such Illinois law and apply the same rule thereto as would be applied to a violation of our own law on that subject.

4. Thus, where an Illinois court, upon granting a divorce, decreed that neither party marry again within the year limited by the statute, but the divorced wife, for the purpose of evading such disability, went to Indiana and married within the year, and thereafter removed to Wisconsin, such marriage will not be recognized in this state.

5. The status of the divorced wife, having been declared and fixed by a court of competent jurisdiction in accordance with a sound public policy, should be recognized and held to be the same in, at least, all states having the same or similar laws. *Frame v. Thormann*, 102 Wis. 653, distinguished.

6. A marriage illegal in its inception cannot become valid in this state except by the establishment, either directly or circumstantially, of an actual contract of marriage after the removal of the impediment which rendered it illegal in the first instance, —mere cohabitation as husband and wife not being sufficient.

7. It appearing that a claimant of compensation on account of the death of her alleged husband had married him in Indiana within one year after an Illinois judgment of divorce and in evasion and violation of that judgment and of an Illinois statute, and that she and the deceased had thereafter come to Wisconsin and had lived here as husband and wife until her death, but without any new contract of marriage, it is *held* that she was not the lawful wife, nor was she "a member of the family" of the deceased, within the meaning of the Workmen's Compensation Act (sub. 4, sec. 2394—10, Stats.).

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

October 27, 1911, the plaintiff, then *Mrs. Wardner,* obtained a decree of divorce from her husband in the superior court of Cook county, Illinois, of which county and state she was then a resident. The decree contained this provision: "but neither party shall marry again within the time forbidden by statute unless they remarry each other." The time forbidden by statute was one year from the granting of

the decree. Sec. 4216, Ill. Ann. Stats. (Jones & Addington). That section further provided that "every person marrying contrary to the provisions of this section shall be punished by imprisonment in the penitentiary for not less than one year, nor more than three years, and said marriage shall be held absolutely void." July 23, 1912, the plaintiff and Philip Hall, both then residents of Chicago, Illinois, went to Crown Point, Indiana, where a marriage was solemnized between them pursuant to the laws of Indiana, which provide that "Marriage is declared to be a civil contract, into which males of the age of eighteen and females of the age of sixteen, not nearer of kin than second cousins, and not having a husband or a wife living, are capable of entering." Sec. 8357, Burns' Ann. Stats. 1914. No disability of either party existed on the ground of age or kinship. After the marriage ceremony was performed at Crown Point the parties left immediately for *Barron*, Wisconsin, where they remained for about two months. They then returned to Chicago and resided there till May 1, 1914, when they again went to *Barron*, where they continued to live as husband and wife till the death of Hall on November 2, 1914. Both parties treated the marriage at Crown Point as valid from the time it was entered into until Hall's death, and during all that time they lived together as husband and wife.

At the time of his death Hall was in the employ of the city of *Barron* and met his death while discharging the duties of such employment. The *Industrial Commission* refused compensation under the Workmen's Compensation Act on the grounds that plaintiff was (1) not the lawful wife of Hall and (2) she was not a member of his family. Upon an appeal to the circuit court for Dane county the court entered a judgment confirming the order of the *Industrial Commission*, and from such judgment the plaintiff appealed.

The cause was submitted for the appellant on the brief of *H. G. Ellsworth* of Barron, for the respondent *Industrial*

Commission on that of the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and for the respondent *City of Barron* on that of *C. C. and A. E. Coe* of Barron.

VINJE, J. That the law favors marriage and that a marriage valid where solemnized is generally held to be valid everywhere have become settled principles in our jurisprudence. Like all general principles, however, they have their exceptions where unusual circumstances would render their application inequitable or where they are contrary to a declared public policy or to good morals. Had the plaintiff been divorced in this state and gone to Indiana and married, as she did within the year, her marriage would have been absolutely void under the rule announced in *Lanham v. Lanham,* 136 Wis. 360, 117 N. W. 787. It was there held that sec. 2330, Stats. 1898, as amended by ch. 456, Laws 1905,—in substance the same as sub. 2 of sec. 2330, Stats. 1915, which provides, "It shall not be lawful for any person, who is a party to an action for divorce from the bonds of matrimony, in any court in this state, to marry again until one year after judgment of divorce is entered, and the marriage of any such person solemnized before the expiration of one year from the date of the entry of judgment of divorce shall be null and void,"—rendered the marriage of a divorced person within the year void though solemnized outside the state. Since the decision of that case the legislature in the enactment of sec. 2330*m* in 1915 has not only specifically declared the rule there announced to be the public policy of the state, but has extended the rule to include marriages solemnized in this state by nonresidents not qualified to marry within their own state. Such section reads:

"Sec. 2330*m*. 1. If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract a

marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state.

"2. No marriage shall be contracted in this state by a party residing and intending to continue to reside in another state or jurisdiction, if such marriage would be void if contracted in such other state or jurisdiction and every marriage celebrated in this state in violation of this provision shall be null and void."

These statutory provisions make explicit exceptions to the general rule that a marriage valid where solemnized will be held valid everywhere. Sec. 4216 of the statutes of Illinois is substantially the same as sub. 2 of sec. 2330 of our statutes and it has received the same construction by the supreme court of Illinois that our court in the *Lanham Case* gave to our statute. See *Wilson v. Cook,* 256 Ill. 460, 100 N. E. 222, 43 L. R. A. N. S. 365, where the *Lanham Case* is quoted with approval. We have therefore a situation where both states have substantially the same declared public policy with reference to prohibited extraterritorial marriages, and we have further the statutory mandate enacted in 1909 and 1911 providing that

"Full faith and credit shall be given in all the courts of this state to a decree of annulment of marriage or divorce by a court of competent jurisdiction in another state, territory or possession of the United States, when the jurisdiction of such court was obtained in the manner and in substantial conformity with the conditions prescribed in sections 2354 and 2355. Nothing herein contained shall be construed to limit the power of any court to give such effect to a decree of annulment or divorce, by a court of a foreign country as may be justified by the rules of international comity; provided, that if any inhabitant of this state shall go into another state, territory or country for the purpose of obtaining a decree of divorce for a cause which occurred while the parties resided in this state, or for a cause which is not ground for divorce

under the laws of this state, a decree so obtained shall be of no force or effect in this state." Sec. 2360*r*, Stats. 1915.

The statute of Illinois with its judicial construction must be deemed imported into plaintiff's divorce decree, and since such statute and construction are substantially the same as ours and since they declare a public policy similar to our own, no good reason is perceived why this court should not take cognizance of plaintiff's evasion of the laws of our sister state and apply the same rule to their infraction that we would apply to a violation of our own like laws. The *Industrial Commission* found that plaintiff went to Indiana to marry in order to evade the disability created by the Illinois decree, and such conclusion finds support in the stipulated facts. The Illinois court had jurisdiction of plaintiff's person and it was competent for it to fix and declare her status. Such status so declared being founded upon grounds of sound public policy should be respected by at least all sister states having the same or similar laws. Reasonable restrictions against speedy remarriage of divorced parties are becoming more common in the statutes of our states and their intentional violation should find no sanction in states having similar restrictions. Only by each state enforcing public policies common to it and other states can our divorce laws be freed from the odium of being wilfully violated with impunity. Our states do not stand in the same relation to each other that foreign countries do. They are members of the same family, and sec. 1, art. IV, of the constitution of the United States requires each state to give full faith and credit to the judicial proceedings of every other state. Comity between states is daily growing and should be encouraged. It should especially find full play, in so far as it is consistent with the laws of the forum, in matters relating to the status of persons, to the end that when such status is once declared by a court of competent jurisdiction it may be held to be the

same everywhere. We realize that our decision goes a step further than that of any case called to our attention, but we believe it is a step in the right direction. We also realize there is a great diversity of opinion as to the validity of prohibited marriages solemnized extraterritorially by residents of the state at the time of such marriage and at the time their validity is called in question. On this subject see the cases and valuable notes in 24 L. R. A. 831; 57 L. R. A. 169; 11 L. R. A. N. S. 1082; 17 L. R. A. N. S. 800; 43 L. R. A. N. S. 358 and 365; L. R. A. 1916C, 748; 5 Ruling Case Law, 1004 *et seq.*, and 9 Ruling Case Law, 502 *et seq.* Cases arising before statutory prohibitions were in force are not so valuable in the solution of the question before us because there was in them generally no element of intentional evasion of a law, or, if a law was violated, it was generally a penal statute of one state perhaps not common to others. The law here in question is one of public policy which may well find enforcement in extraterritorial jurisdictions having the same or similar laws.

The case is quite different from the class of cases of which *Frame v. Thormann,* 102 Wis. 653, 79 N. W. 39, forms an example, where it was sought to invoke the aid of an extraterritorial penal statute which we did not have in form or substance. In such cases extraterritorial statutes will not be enforced in this state. The difference is clearly pointed out in *Lanham v. Lanham,* 136 Wis. 360, 117 N. W. 787.

It is urged that the marriage of plaintiff would be held valid by the courts of Indiana. This argument we are in no position to meet, nor is it necessary that we should. The question is whether the courts of our state should recognize it. Some doubt as to whether Indiana courts would hold as contended may be suggested by the fact that that state has a statutory provision to the effect that "A divorce decreed in any other state, by a court having jurisdiction thereof, shall have full effect in this state" (sec. 1090, Burns' Ann. Stats.

1914), and by the further provision contained in sec. 8367 to the effect that marriages solemnized outside the state in order to evade the provisions of the Indiana laws shall be void. It is evident that Indiana also has provided for exceptions to the rule that a marriage valid where solemnized is valid everywhere.

Since the marriage in Indiana was invalid it could not ripen into a valid common-law marriage after the lapse of the year by mere cohabitation. It is now the settled doctrine of this state that a marriage illegal in its inception cannot become valid except by the establishment, either directly or circumstantially, of an actual contract of marriage after the removal of the impediment which rendered it illegal in the first instance—mere cohabitation as husband and wife is not enough. *Williams v. Williams,* 46 Wis. 464, 1 N. W. 98; *Spencer v. Pollock,* 83 Wis. 215, 53 N. W. 490; *Thompson v. Nims,* 83 Wis. 261, 53 N. W. 502; *Lanham v. Lanham,* 136 Wis. 360, 117 N. W. 787; *Severa v. Beranak,* 138 Wis. 144, 119 N. W. 814.

The claim that plaintiff was a member of the family of Hall and on that ground was entitled to compensation is negatived in *Armstrong v. Industrial Comm.* 161 Wis. 530, 154 N. W. 844.

By the Court.—Judgment affirmed.

McDONALD and another, Appellants, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

March 16—April 4, 1917.

Workmen's compensation: Permanent total disability: Evidence: "Other suitable employments:" Business undertaking: Payment in gross: When may be ordered: Waiver as to time.

1. Since the enactment of ch. 599, Laws 1913, amending sub. 2, sec. 2394—10, Stats. 1911, the nature and extent of the disability caused by an injury to an employee, as well as his compensation for such disability, are to be measured with reference to the impairment of his earning capacity in the employment in which he was working at the time of the accident "and other suitable employments."
2. A finding by the industrial commission in this case, confirmed by the circuit court, that by an injury to an employee who worked as a carpenter and laborer he had for all practical purposes lost the use of his legs at the hip and was permanently totally disabled, is *held* to be supported by the evidence.
3. A man's wage-earning capacity, which is the foundation of the Workmen's Compensation Act, is to be distinguished from his capacity to make money in a business conducted under his supervision or direction and with the use or investment of other capital than that which arises from his own labor; hence the mere fact that an injured employee wished to have his award in a lump sum so that he might undertake some small business to be conducted by him and his wife, should not militate against his right to compensation for permanent total disability to carry on the work in which he was employed at the time of the accident or other suitable employment.
4. At a hearing before the industrial commission within six months after an employee was injured it appeared that his condition was such that the extent of the injury could be as well determined at that time as after the lapse of the six months provided for in sub. (5) (1), sec. 2394—9, Stats. Defendant's counsel consented that a gross sum might be awarded at that time for a permanent partial disability, and made no objection to the proceeding or request for a postponement of the hearing if the relief demanded, namely, an allowance for a permanent total disability, was to be considered by the commission. *Held*, that there was in effect a waiver of objection to a determination at that time of the question whether or not the disability was permanent and total, and to an award of a gross sum accordingly.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from a judgment confirming an award by the *Industrial Commission.*

The cause was submitted for the appellants on the briefs of *Burr J. Scott* of Milwaukee, for the respondent *Industrial Commission* on that of the *Attorney General* and *J. E. Messerschmidt*, assistant attorney general, and for the respondent *Edwards* on that of *M. E. Davis* of Green Bay.

ESCHWEILER, J. The respondent *Edwards* was seriously injured on March 18, 1916, while in the employ of the appellant *C. S. McDonald,* and the only question raised on this appeal is whether or not the *Industrial Commission* could properly award compensation to him under sub. (2) (d), sec. 2394—9, Stats., for a permanent total disability which shall not exceed six times his average annual earnings, or whether the award should have been for a temporary or partial disability under the same subdivision, the aggregate indemnity for which shall not exceed four times his average annual earnings.

Total disability is defined in the same subdivision as follows:

"Total blindness of both eyes, or the loss of both arms at or near the shoulder, or of both legs at or near the hip, or of one arm at the shoulder and one leg at the hip, shall constitute permanent total disability. This enumeration shall not be exclusive but in other cases the commission shall find the facts."

In this same Workmen's Compensation Act is provided a method of computation, sec. 2394—10. By sub. 2 of that section it is provided as follows:

"2. The weekly loss in wages referred to in section 2394—9 shall consist of such percentage of the average weekly earnings of the injured employee, computed according to the provisions of this section, as shall fairly represent

the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, *and other suitable employments* [these words inserted by ch. 599, Laws 1913], the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury."

Under sub. (5) (l), sec. 2394—9, it is provided that the *Commission* may order payment in gross or in such manner as it may determine to the best interests of the parties any time after six months have elapsed from the date of the injury. The award in this case for payment in a gross sum and as and for a total disability and for a sum equivalent to six times his average annual wages was made August 17th and within six months after the accident. The medical testimony discloses that the injury caused to the respondent by his fall from a pile-driver resulted in the fracture of the first lumbar vertebra, together with deformity of the spinal column, resulting in pressure on the spinal cord. There was a partial paralysis of the sphincter muscles of both the urinary bladder and rectum, resulting in loss of control over the urine and partial loss of control of the bowel movements, with considerable weakness of the lower limbs and back.

At the time of the hearing it appeared that he was able to walk to some extent without the use of crutches and by the use of a cane and from respondent's statement he was not able to do any work. He had no other trade than the carpenter trade and occasional work as laborer. One doctor testified that respondent could do a good deal of work if it doesn't require much walking or stooping; another physician said that the man could never do manual labor requiring the use of his legs and back, that the paralysis is not complete in that there is no complete destruction of the spinal cord, and that the condition is neither increasing nor diminishing, that his condition could be determined at that time as well as later. After this testimony was received appellants' counsel

made the statement: "I can see a permanent partial disability that will run the maximum amount on his wage basis; it is just a question of how the *Commission* wants to pay." The respondent's counsel at that time claimed that compensation should be awarded on the basis of permanent total disability. Nothing else was suggested by way of objecting to the disposing of the entire matter by the *Commission* at that time before the expiration of the six months. The *Commission* found as part of the award that for all practical purposes the applicant has lost the use of his legs at the hip, and under this state of facts he is totally permanently disabled.

Under the Compensation Act as it stood prior to the enactment of ch. 599 of the Laws of 1913, an injury to an employee the effect of which would be to prevent his further proceeding "in the employment in which he was working at the time of the accident" would compel an award to him as a total permanent disability although the facts might disclose that he was able to earn as much or more than before in some other suitable employment. Apparently to meet the situation disclosed by the case in which this was commented upon, *Mellen L. Co. v. Industrial Comm.* 154 Wis. 114, 142 N. W. 187 (*Winters's Case*), the words "and other suitable employments" were inserted in sub. 2, sec. 2394—10, showing the evident intent of the legislature to hereafter require this new provision to be a part of the standard of measure both as to the nature and extent of the injury as well as to the compensation; that is, it becomes applicable to sec. 2394—9 as well as to sec. 2394—10.

Under the power granted the *Commission* by sub. (2), sec. 2394—9, to find facts constituting permanent total disability, if any such exist, we cannot say that there is no support for the determination arrived at by the *Commission* and confirmed by the circuit court. The testimony warrants the conclusion that this man is permanently and totally disabled

from performing labor at his trade as a carpenter or such labor as he was employed in at the time of the accident as well as being permanently and totally disabled from performing manual or other labor in any other suitable employment. *Lemieux's Case,* 223 Mass. 346, 111 N. E. 782; *Duprey's Case,* 219 Mass. 189, 106 N. E. 686; *Floccher's Case,* 221 Mass. 54, 108 N. E. 1032.

It is urged that because the record discloses that the respondent desired to have the award in a lump sum so that he might undertake some small business to be conducted by him and his wife, therefore, by his own admission, he could not be considered as permanently and totally disabled. We do not think this distinction can be properly taken. There is a substantial difference between a man's wage-earning capacity, the foundation of the Workmen's Compensation Act, and his capacity to make money in a business conducted under his supervision or direction and with the use or investment of other capital than that which arises from his own labor. Success in such an undertaking is so evidently dependent upon manifold conditions other than the capacity to work that it cannot, as the law is now written, be considered to be a condition that must militate against his right to compensation for permanent total disability to carry on the work which he was employed in at the time of the accident or other suitable employment. Such distinction is pointed out in the case of *Moore v. Peet Bros. Mfg. Co.* (Kan.) 162 Pac. 295.

It is strenuously urged that, inasmuch as the concession by appellants' counsel on the hearing was solely to the effect that compensation might be awarded in a gross sum on the conceded showing of a permanent partial disability, the *Commission* then had no jurisdiction or power to go beyond that concession as to the nature of the disability and make a gross award for a permanent total disability. It appears from evidence before the *Commission* that the condition of the respondent could be as well determined in August as it could

after the six months expiring in September, and there being no further or more express objection to the proceeding then before the *Commission,* or a request for a postponement of the hearing, if the relief then demanded by respondent, namely, for an allowance for a permanent total disability, was to be considered by the *Commission,* we cannot say that the *Commission* was not warranted in coming to the conclusion that the mere question as to the time when a determination should be arrived at as to whether this was a case of a partial or temporary disability, or a total permanent disability, was in effect waived.

By the Court.—The judgment of the circuit court is affirmed, with costs to be taxed in favor of the respondent *Edwards* against the appellant *Travelers Insurance Company.*

BRUNO, Plaintiff in error, vs. THE STATE, Defendant in error.

March 16—April 4, 1917.

Assault: Charivari: Use of firearms: Instructions to jury: Self-defense: Harmless error.

1. The use of firearms against members of a charivari party cannot be justified except where personal violence is threatened and it seems to be necessary for self-defense.
2. Upon a trial for assault with intent to do great bodily harm, a statement of the trial judge in his instructions to the jury as to the testimony of a witness who identified the defendant by his voice, is *held* to have been entirely correct.
3. Although in such case the defendant denied the act charged, *i. e.* the firing of a shotgun into a charivari party, it being possible under the evidence that the jury might disbelieve his story and find that he fired in lawful self-defense, the error, if any, in submitting to the jury the question of self-defense was one favorable to defendant.

ERROR to review a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

The plaintiff in error (hereafter called the defendant) was convicted of assault with intent to do great bodily harm and brings his writ of error to reverse the judgment. The facts were that the defendant, a farmer, was at his home in the town of Reseberg, Clark county, on the evening of October 14, 1916, with his wife and family, consisting of an adult son and daughter, and a young man named William Karpinski who was paying attention to the daughter. At about 9 o'clock in the evening a number of young men and boys of the neighborhood came to the house, called out Karpinski, told him that they knew he was married, asked him for some money, or they would charivari him, and on being refused commenced the charivari by firing a gun and exploding dynamite near the house, ringing bells, beating on tinpans, and making the other noises which usually characterize this highly refined and humorous proceeding. The defendant and his family came out of the house and stood on the porch for a few minutes during the uproar. The defendant claims that rifle shots were fired by the young men and that one bullet struck very near him and his wife, and that they then went in the house. It is claimed by the prosecution that the defendant had a shotgun and fired several times into the crowd while he was standing on the porch. This is utterly denied by the defendant, who claims that all the shooting was done by the young men. It is undisputed that several of the young men received small shot wounds, some about the head and some in the arms and side. After the shots were fired the crowd went down the road. A short time afterwards two of the young men returned to the defendant's house and called him to the door, and one of them said, "See what you have done to me," showing his wounds, and the defendant said, "It is funny if a man can't live in America and be left alone when he is minding his own business," and told them they had better go away. There was testimony to the effect that the defendant afterwards said to two or three witnesses that a bullet very nearly

killed his daughter and then he couldn't stand it any longer and he shot.

The court charged the jury among other things that:

"The witness Albert Buss testifies that he saw the defendant standing at the southwest corner of the house; the shooting began a very little instant after; that he knows the defendant's voice and that he is quite positive it was the defendant. He said the defendant said 'I will show those fellows who is living here.' "

"If the jury find that the defendant is not telling the truth when he says he did not fire the shots which wounded the boys, but that he was the one who did the shooting, the question may arise whether the defendant was justified under the circumstances."

"The use of a deadly weapon to repel a simple assault is not ordinarily justified. If the defendant fired into the crowd, he can only justify such an act by making out that it was done in self-defense within the rule the court has given."

The cause was submitted for the plaintiff in error on the brief of *R. J. MacBride,* of counsel, and *Emery W. Crosby,* attorney, both of Neillsville, and for the defendant in error on that of the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general.

WINSLOW, C. J. We have thoroughly reviewed the evidence and given careful consideration to the errors assigned, but have found no reason for reversing the judgment. Exasperating and senseless as such a disturbance is, the use of firearms cannot be justified except where personal violence is threatened and it seems to be necessary for self-defense. The jury have negatived any such situation here.

The errors assigned will be briefly considered. The statement made by the trial judge as to the testimony of the witness Buss is an entirely correct statement. It is true that the witness admitted that he could not distinguish the form of the defendant from that of the son, but as the witness was at some distance and the time was after 9 o'clock in the even-

ing, this is not singular nor significant. He identified the defendant by his voice, with which he was very familiar.

As to the other instructions, the only serious objection is that they submit to the jury the question of self-defense when no evidence had been offered on that subject. *Eggett v. Allen,* 106 Wis. 633, 82 N. W. 556.

It is true that the defendant himself denied the act, but two witnesses called by the state testified that he admitted the act to them and excused it on the ground that the boys shot bullets into the shed and nearly killed his daughter who was standing beside him. There was also considerable testimony introduced by the defendant as to the state of terror into which his wife and daughter were thrown. It was quite possible under the testimony for the jury to disbelieve the defendant's story and yet find that he shot in lawful self-defense, and the judge in submitting that question to the jury did him a kindness rather than an injury. If there was any error (which we do not intimate or decide) it was an error against the state rather than against the defendant.

The provocation under which the defendant acted was certainly great. Apparently he was a respectable citizen who had lived a law-abiding and useful life for years upon his own farm. He was no tramp or ordinary criminal. He was at his home surrounded by his family, engaged in a peaceful and commendable occupation, when this pandemonium of noise broke loose. It must have been to the last degree exasperating. While it did not justify shooting and hence does not permit us to reverse this judgment, we deem it proper to say it may well be considered by the executive upon an application for pardon. If this court had the pardoning power we feel the circumstances here presented would make a strong appeal to us for its exercise.

By the Court.—Judgment affirmed.

On June 16, 1917, the Governor commuted defendant's sentence to thirty days in the county jail.—REP.

ELLIS, Respondent, vs. FRAWLEY and another, Appellants.

January 19—April 24, 1917.

Attorneys at law: Stirring up litigation: Contracts: Validity: Public policy: Appeal: Objections not made at trial.

1. An agreement between a firm of lawyers and another lawyer, pursuant to which the latter went around among the sufferers from a flood and persuaded them to employ the firm to prosecute their damage claims and to assign their claims to one person for the purpose of facilitating the litigation, was against public policy, and the courts will not assist said lawyer to recover anything from the firm for his services in carrying out that agreement, whether such services were rendered before or after the procuring of the assignments.
2. A judgment against the firm for the value of such services must be reversed on appeal even though the objection that the agreement was against public policy was first raised in the appellate court.

APPEAL from a judgment of the circuit court for Eau Claire county: E. RAY STEVENS, Judge. *Reversed.*

Action for an accounting and settlement of the affairs of a joint business venture or partnership. The plaintiff is a lawyer residing and practicing at Black River Falls, the defendants are lawyers residing and practicing at Eau Claire. In October, 1911, a destructive flood occurred in the Black river by which much private and public property was destroyed in the city of Black River Falls. It was claimed generally that the flood resulted from the negligence of the La Crosse Water Power Company in the operation of its dam across said river. The complaint charges that in April, 1912, the plaintiff and defendants made a partnership agreement by which they were to act jointly as attorneys in prosecuting claims for all persons who might employ them to sue for and collect their claims against the Power Company arising out of said flood, and that in pursuance of that agreement the partnership brought suits for a large number of such claimants and performed professional services in such

suits and finally effected a settlement of such claims for a large sum of money, and that the defendants received in payment for such partnership services more than $20,000, of which one half belongs to the plaintiff, but that said defendants refuse to pay the plaintiff any part thereof. The defendants denied the existence of any such partnership. The action was tried by the court without a jury, and the court found that no partnership was formed, but "that plaintiff at the request of the defendants rendered services to the defendants in inducing flood sufferers to retain the defendants to prosecute their claims and in procuring assignments of such claims, that he continued to render services to the defendants during the years 1912 and 1913 with reference to the losses sustained and claims made by such flood sufferers which defendants were seeking to recover through actions brought by them acting as attorneys for such flood sufferers;" also "that said services rendered by the plaintiff to the defendants at their special instance and request are reasonably worth the sum of $975." There is no bill of exceptions. The defendants appeal from judgment against them in accordance with the findings.

For the appellants there was a brief by *W. H. & T. F. Frawley,* in person, and *Bundy & Wilcox* and *Sturdevant & Farr,* all of Eau Claire, of counsel, and oral argument by *C. T. Bundy.*

For the respondent a brief by *R. J. MacBride* of Neillsville was submitted by *L. Olson Ellis, in pro. per.*

The following opinion was filed February 13, 1917:

WINSLOW, C. J. There being no bill of exceptions, the only inquiry presented is whether upon the facts found by the trial court the judgment is right. Those facts are: A firm of lawyers requested another lawyer to go around among the flood sufferers and persuade them to employ the firm to prosecute their damage claims and to execute assignments of

their claims to one person for the purpose of facilitating the litigation; the second lawyer undertook the task, was successful in his work, and has recovered the value thereof. The judgment is right unless the arrangement between the parties was against public policy. If it was, the judgment is wrong and must be reversed even though the objection be now made for the first time. *Jacobson v. Bentzler,* 127 Wis. 566, 107 N. W. 7. The court will not allow itself to be used as the means of carrying into effect a contract which is essentially contrary to morality or to public policy even though no objection be made by the parties. *Wight v. Rindskopf,* 43 Wis. 344. It seems that the arrangement was clearly against public policy.

The mere intermeddler, the officious stirrer up of litigation in which he has no interest save the possibility of a commission or a fee, has been condemned by courts and legislators since the earliest times. This is so because the practice of the law is not a trade but a ministry.

Chief Justice RYAN well said in his eloquent address before the graduating law class of the University of Wisconsin for 1873:

"The pursuit of the legal profession for the mere wages of life is a mistake alike of the means and the end. It is a total failure of appreciation of the character of the profession. This is the true ambition of a lawyer: To obey God in the service of society; to fulfil His law in the order of society; to promote His order in the subordination of society to its own law, adopted under His authority; to minister to His justice, by the nearest approach to it, under the municipal law, which human intelligence and conscience can accomplish. To serve man, by diligent study and true counsel of the municipal law; to aid in solving the questions and guiding the business of society, according to the law; to fulfil his allotted part in protecting society and its members against wrong, in enforcing all rights and redressing all wrongs; and to answer, before God and man, according to the scope of his

office and duty for the true and just administration of the municipal law."

The ideal here expressed is high, it is by no means always lived up to, but it is none the less the ideal towards which the profession should ever strive. It is because the ideal is frequently lost sight of, because many lawyers practice their profession as if it were a mere business like the buying and selling of groceries, that the profession falls into disrepute. The great Chief Justice died before the evolution of the personal injury action and that degraded form of lawyer commonly known as the "ambulance chaser." What he would have said of them can better be imagined than described.

The twenty-eighth canon of ethics adopted by the American Bar Association treats the subject as follows:

"*Stirring up Litigation, Directly or Through Agents:* It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship, or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases into his office. . . . A duty to the public and to the profession devolves upon every member of the bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred."

This court in the past has taken an elevated view of the duties of an attorney in the practice of his profession, and we have no inclination to take any less elevated view now. *Wight v. Rindskopf, supra.* The standard should be raised rather than lowered, for the age in which we live is one which is much concerned with money and the things which money

will bring. The fact that the lawyer must support himself by his professional labors and that he receives his compensation from a purely private source unquestionably has a tendency to commercialize his work and obscure even from his own mind the fact that his real client is Justice. To successfully combat this tendency we must have lawyers who not only say but really believe that they *are* ministers of justice and not men hired by their clients to circumvent or outwit the law. We cannot have such lawyers if such contracts as this are to be approved.

It is stated in respondent's brief that the claims secured by the aid of the plaintiff were all assigned to one person, that one action was commenced thereon, but that before trial a settlement was made for a sum somewhere between fifty and sixty thousand dollars, out of which the defendants, by virtue of their contracts with the claimants, retained forty per cent. or about $22,000. These facts are not in evidence, but they may properly be assumed as true as against the party who asserts them. This, then, was the scheme to the consummation of which the plaintiff agreed to contribute, *i. e.* a scheme to get hold of all the claims possible and in case of success *forty* per cent. of the proceeds was to go to the lawyers and sixty per cent. (probably after payment of costs) to the people whose property had been swept away.

Attorneys are entitled to good pay, for their work is hard, but they are not entitled to fly the black flag of piracy. Such contracts as are here in question tend to make the lawyer forget his high duty as a minister of justice and to convert him into a mere grubber for money in the muck-heaps of the world. They also tend to make the name of lawyer a proverb and a byword among laymen.

A number of courts have condemned contracts of this nature. 2 Thornton, Attorneys, § 436; *Gammons v. Johnson,* 76 Minn. 76, 78 N. W. 1037; *Holland v. Sheehan,* 108 Minn. 362, 122 N. W. 1; *Ingersoll v. Coal Creek C. Co.* 117 Tenn.

263, 98 S. W. 178; *Meguire v. Corwine,* 101 U. S. 108; *Ford v. Munroe* (Tex. Civ. App.) 144 S. W. 349.

In most of the cases cited the party soliciting the business was a layman, but it is not perceived how this fact affects the principle involved. If it is against public policy for a layman to foment litigation and make a claim bureau of himself under contract with a law firm, it would seem to be fully as much so for a lawyer to do the same thing.

The contract being against public policy, the courts will affirmatively assist neither party, but will leave them where it finds them.

The question has suggested itself whether the plaintiff might not be entitled to recover the value of the services which the finding states he rendered after the procuring of the assignments, on the ground that these later services were independent of the original contract and not affected by its invalidity. On reflection, however, we do not see how they can be separated. Whatever the original agreement was, whether an agreement of partnership as stated in the complaint, or an agreement of hiring as found by the court, it is clear that the respondent's position has been and now is that all his services were rendered in the carrying out of that agreement.

By the Court.—Judgment reversed, and action remanded with directions to render judgment dismissing the complaint on the merits.

VINJE, J., took no part.

A motion for a rehearing was denied, with $25 costs, on April 24, 1917.

STATE EX REL. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY vs. CIRCUIT COURT FOR WAUSHARA COUNTY and another.

March 16—April 24, 1917.

Venue: Action on life insurance policies: Where cause of action arose: Proofs of loss: Service: Appointment of administrator: Distinction between "arise" and "accrue."

1. Life insurance policies were issued and were payable in M. county, in which the insurance company (a domestic corporation) had its principal office. The insured resided at the time, and until his death, in W. county. Notice and proofs of death were to be furnished to the company in M. county, and were in fact drawn in W. county and mailed there to the company in M. county. An administrator of the estate of the insured was appointed in W. county. *Held*, that an action upon the policies was properly triable in M. county, under sub. 5, sec. 2619, Stats., no part of the cause of action having arisen in W. county.
2. As to the proofs of death, the act essential to a recovery was not the drawing or mailing of them in W. county, but the service of them on the company, and this took place in M. county.
3. The appointment of the administrator was not an essential part of the cause of action; it merely designated the person who was to enforce it.
4. Although a cause of action does not "accrue" until there is a person in existence with a present right to sue upon it, a cause of action may logically be said to "arise" when the facts necessary to demonstrate the defendant's breach of duty and liability to some person or group of persons or interests have all come into existence, even though the person or group be not at the time competent to sue.

KERWIN, SIEBECKER, and ESCHWEILER, JJ., dissent.

THIS IS a *mandamus* action commenced in this court to compel the *Circuit Court for Waushara County* to change the venue of an action to Milwaukee county. The case is now before us on a motion to quash the alternative writ. The petition and writ show that the facts appearing on the hearing of the motion were substantially as follows: The plaintiff as administratrix of the estate of Melvin Plank, deceased, brought action in the *Circuit Court for Waushara County*

against the defendant on two insurance policies on the life of said Melvin in favor of his estate. Melvin was a resident of Waushara county at the time of their issuance and remained such until his death. He left his home May 29, 1908, went to Portage, Milwaukee, and Chicago, and was last heard from in Chicago, where it is alleged that he died on that day. Premiums were paid up to June 25, 1908. The policies were issued in Milwaukee and payable there. The premiums were to be paid in Milwaukee and were in fact paid at Stevens Point in Wood county. Notice and proofs of death were to be furnished to the company at Milwaukee and were in fact drawn in Waushara county and mailed to the company at Milwaukee. The plaintiff in that action resides in Waushara county and was appointed administratrix of the estate of Melvin Plank by the county court of that county in August, 1915, before the commencement of this action.

The petitioner in this action is a domestic corporation with its principal office at Milwaukee. Motion was made in the *Circuit Court for Waushara County,* based upon the complaint and certain affidavits showing the facts above set forth, to change the venue of the action to Milwaukee county under sub. 5, sec. 2619, Stats., which provides that the place of trial of an action against a domestic corporation shall be "the county in which it is situated or has its principal office or place of business, or in which the cause of action or some part thereof arose." The trial court denied the motion on the ground that a part of the cause of action arose in Waushara county.

For the relator there was a brief by *Jno. Barnes, J. R. Dyer,* and *H. N. Laflin,* and oral argument by *Sam T. Swansen,* all of Milwaukee.

For the defendants there was a brief signed by *Walter D. Corrigan* of Milwaukee and *Buchanan Johnson* of Plainfield, and oral argument by *Mr. Corrigan.*

WINSLOW, C. J. It is plain that the petitioner was entitled to have the action removed to Milwaukee county unless some part of the "cause of action" arose in Waushara county.

This court has held that the words "cause of action" as used "include the act or omission without which there would be no cause of action or right of recovery." *Bruil v. Northwestern Mut. R. Asso.* 72 Wis. 430, 39 N. W. 529; *Hosley v. Wis. O. F. Mut. L. Ins. Co.* 86 Wis. 463, 57 N. W. 48. Whether this proposition be entirely logical may perhaps be doubted, but we do not find it necessary to question it now. Applying it to the present case, we find no "acts or omissions" occurring in Waushara county except the drawing and mailing of the proofs of death and the appointment of the plaintiff as administratrix of the estate. Neither the drawing nor mailing of the proofs of death in Waushara county can be considered as an act essential to a recovery; it is the service of them on the company which is the *sine qua non* of a recovery, and this took place in Milwaukee county. As to the appointment of the administratrix the question is somewhat different. It is quite true that by the great current of authority a "cause of action" does not "accrue," within the meaning of statutes of limitation, until a person is in existence with a present right to sue upon it. 1 Wood, Lim. (4th ed.) § 117; 25 Cyc. 1067; *American R. Co. v. Coronas*, 230 Fed. 545. The case last named contains an exhaustive review of the authorities on the question. This rule was recognized by this court in the case of *Stehn v. Hayssen*, 124 Wis. 583, 102 N. W. 1074.

There is, however, a substantial difference in meaning between the words "arise" and "accrue." A cause of action may logically be said to arise when the facts necessary to demonstrate the defendant's breach of duty and liability to some person or group of persons or interests have all come into existence, even though the person or group be not at the

time competent to sue, but must sue through a representative to be appointed later, while it cannot be said that a cause of action has "accrued" until there was a person in existence to whom it can accrue, for the very plain reason that a thing must accrue *to* somebody. Accrue means to increase, to augment, to add to something already existing by way of increase.

A complete cause of action certainly arises in favor of a man's estate when he meets death through the actionable negligence of another or if he dies owning a note which falls due immediately after the death; it is in abeyance, however, until the appointment of an administrator, when it "accrues" to such administrator.

The appointment of the administrator neither adds to nor takes from the essential parts of a cause of action; it simply designates the person who is to enforce it. If it were to be held to be an essential part of the cause of action, then it would necessarily follow that the cause of action would cease to exist in case of the administrator's death, resignation, or removal, and that a new and different cause of action would accrue to the next administrator. It is plain that this cannot be. There is but one cause of action, no matter how many administrators may in succession prosecute it.

It is to be remembered that under our statute (sec. 4251) the cause of action becomes barred if the appointment of an administrator be delayed until double the limitation period otherwise prescribed by law.

By the Court.—Adjudged that the motion to quash be overruled and that the peremptory writ of *mandamus* issue as prayed in the petition. No costs to be taxed.

KERWIN, J. (*dissenting*). I most respectfully dissent from the decision of the majority of the court in this case.

The majority opinion in the main seems to turn on the

difference between the words "arise" and "accrue," used in referring to causes of action under our statutes.

It seems to me plain under the authorities that the words are used interchangeably, and that under our statutes a cause of action does not "arise" until it "accrues." In other words, before a cause of action "arises" or "accrues" it must be a complete cause of action, one in which there is a person competent to sue, whereas in the case at bar there is no person competent to sue until an administrator is appointed. Among other definitions of the word "accrue," Bouvier (Law Dict., Rawle's Rev. 1897) gives the following: "To arise, to happen, to come to pass." "A cause of action accrues when suit may be commenced for a breach of contract." A cause of action accrues from the time the right to sue for the breach attaches. *Amy v. Dubuque,* 7 Otto (98 U. S.) 470.

Webster defines "accrue:" "To arise or spring as a growth or result."

One of the definitions of "accrue" in the Century Dictionary is, "Arise in due course," and another is, "In law, to become a present and enforceable right or demand."

When a right of action is given for causing the death of a person in favor of his representative, such action cannot accrue until the appointment of the representative, so as to set in motion the statute of limitation. *Barnes v. Brooklyn,* 22 App. Div. 520, 48 N. Y. Supp. 36.

In the leading English case, *Murray v. East India Co.* 5 B. & Ald. 204, which has been followed quite generally throughout the United States, it is said: "It cannot be said that a cause of action exists unless there be also a person in existence capable of suing." In this case it will be observed that the word "exists" is used instead of "accrues."

In *Stehn v. Hayssen,* 124 Wis. 583 (102 N. W. 1074), at p. 588 it is said:

"No cause of action can accrue until there is some person

in existence who can bring it, and there is no person in existence to bring an action in favor of the estate of a deceased person, which arises after death, until an executor or administrator is appointed."

In *Hobart v. Connecticut T. Co.* 15 Conn. 145, it is held: "Now, independently of authority, we think it cannot be said that a cause of action exists unless there be also a person in existence capable of suing."

In *Andrews v. H. & N. H. R. Co.* 34 Conn. 57, it is held:

"A cause of action accruing to an administrator after the death of the intestate is not complete and does not *arise* and exist so that the statute of limitations can begin to run upon it [if there be no executor], until an administrator is appointed who can bring suit."

In *Walters v. Ottawa,* 240 Ill. 259, 88 N. E. 651, it is held that:

" 'Cause of action' includes every fact necessary for the plaintiff to prove to entitle him to succeed,—every fact that defendant would have a right to traverse. . . . The terms 'right of action' and 'cause of action' are equivalent expressions. By this phrase [cause of action] is understood the right to bring an action, which implies that there is some person in existence who can assert and also a person who can lawfully be sued. . . . If he have no legal right to sue, he has not merely a bad cause of action, but no cause of action."

See, also, *American R. Co. v. Coronas,* 230 Fed. 545, L. R. A. 1916E, 1095, where a great many cases upon the subject are discussed.

In the instant case, even if the cause of action had accrued or arose before the appointment of an administrator (which I deny), I think it clear that the allegations that an administrator was duly appointed and qualified were a material and necessary part of the cause of action. *Campbell v. U. S.* 13 Ct. Cl. 108; *Beal v. Batte,* 31 Tex. 371; *Neil v. Cherry,* 2 Ohio Dec. 28; *Secor v. Pendleton,* 47 Hun, 281; *Moir v. Dodson,* 14 Wis. 279; *Headlee v. Cloud,* 51 Mo. 301; *Hamil-*

ton v. McIndoo, 81 Minn. 324, 84 N. W. 118; *Foster v. Adler,* 84 Ill. App. 654; *Barfield v. Price,* 40 Cal. 535, at p. 543.

It is said in the majority opinion that if it be held that the appointment of an administrator is an essential part of the cause of action, then it would necessarily follow that the cause of action would cease to exist in case of the administrator's death, resignation, or removal, and that a new or different cause of action would accrue to the next administrator. I do not think this follows. After an administrator is appointed the cause of action becomes complete, and the death, resignation, or removal would simply necessitate the revival of the action in the name of a proper representative.

It seems to me also that our statute, sec. 4251, supports the idea of all the authorities, including *Stehn v. Hayssen,* 124 Wis. 583, 102 N. W. 1074, to the effect that the cause of action does not arise or accrue until the appointment of an administrator. See, also, Revisers' Notes to sec. 4251, Stats.

Sec. 2619, Stats., is the section involved upon this appeal. Our court construed this section in *Bruil v. Northwestern Mut. R. Asso.* 72 Wis. 430, 39 N. W. 529, and stated:

"It seems to us clear that no cause of action arose on this contract until the death of the assured in Iowa county and notice thereof to the defendant. The words 'cause of action,' as here used, would seem to be synonymous with right of action, and include the act or omission without which there would be no cause of action or right of recovery. 'A cause of action is said to accrue to any person when that person first comes to a right to bring an action.' 1 Bouv. Law Dict. 291. . . . It is evident that no cause of action arose until the death of Dr. Bruil and notice of that fact was given to the company. Then it was the duty of the defendant to make payment according to the contract. So the fact which gave rise to the cause of action, or, in other words, gave the right of action, accrued in Iowa county, and not in Dane county. . . . A cause of action does not arise, within the meaning of the statute, until the existence of such a state of facts as will en-

able the person having the proper relations to the property or persons concerned to bring the action. Within that construction, a cause of action does not arise until the facts exist which constitute the cause of action, and not merely the one fact which may be the breach of duty."

I am satisfied that the petitioner was not entitled to have the case removed to Milwaukee county, for the reason that a part of the cause of action arose and accrued in Waushara county.

I am authorized to say that Justices SIEBECKER and ESCHWEILER concur in this dissent.

WHEELAN, Respondent, vs. UNITED STATES FIDELITY & GUARANTY COMPANY, Appellant.

April 4—April 24, 1917.

Attorney and client: Recovery for services: Interest: Fidelity bond: Payment of claim before liability established: Defense fund in hands of attorney: Trust: Right of surety to fund: Evidence.

1. In an action by an attorney at law against a bonding company to recover for services and disbursements, it is *held* that the undisputed evidence shows that plaintiff was retained by defendant in the matters concerning its liability on a fidelity bond, and that the jury's finding as to the amount which plaintiff was entitled to recover is sustained by the evidence.
2. A claim having been made against defendant upon a fidelity bond by which it had insured a city to the amount of $2,500 against loss through larceny or embezzlement by one C., a city employee, defendant retained plaintiff, an attorney, in the matter, but afterwards, against his advice, paid $2,500 to the city on account of said claim. Thereafter, in a criminal action for larceny and embezzlement, C., who was defended by plaintiff, was acquitted. In this action to recover for services rendered by plaintiff to defendant the latter counterclaimed for $2,500 on the ground that money to that amount had been sent by relatives of C. to his wife and had been turned over to plaintiff subject to a trust for the benefit of defendant, and that it was

to be used to pay any shortage in C.'s accounts with the city and to discharge the liability of C. to defendant and the liability of C.'s father upon an indemnity bond which he had given to defendant. The jury found that the fund so received by plaintiff was not sent to C.'s wife to be used solely for the purposes thus alleged. *Held*, upon the evidence, that such finding is not clearly wrong, and hence it must stand.

3. Although a certificate of deposit of the money so received by C.'s wife was indorsed by her to plaintiff, and he deposited the same, as attorney for the defendant, it appears that this was done for the sole purpose of preventing garnishment of the fund by C.'s creditors; and the undisputed evidence shows that plaintiff did not receive it to hold as the attorney or agent of the defendant, but was to use it for the benefit of C. in defending the criminal action, to protect C.'s father against liability on his indemnity bond, and, so far as possible, to discharge the liability of C. to the city if he should be found guilty of larceny or embezzlement.

4. It having been established that plaintiff does not hold said $2,500 fund for the purpose of discharging any liability of C. to the defendant, and C. not being a party to this action, the question whether C. had been guilty of larceny or embezzlement of the city's funds so as to become liable to defendant is not a proper issue to be determined on defendant's counterclaim; and until such a liability has been legally established defendant cannot assert a liability of C.'s father on the indemnity bond. Evidence offered by defendant to show that C. was guilty of larceny or embezzlement was, therefore, properly excluded in this action.

5. Interest upon the amount found due to plaintiff in an action for legal services was properly allowed from the date of demand by him to the date of the entry of judgment.

ROSENBERRY, J., WINSLOW, C. J., and ESCHWEILER, J., dissent.

APPEAL from a judgment of the circuit court for Wood county: BYRON B. PARK, Circuit Judge. *Affirmed.*

This is an action by the plaintiff to recover $452.03 which he claims is due him from the defendant for legal services rendered for the defendant in connection with the defendant's liability upon a bond to insure the city of Marshfield against loss through embezzlement or larceny of one Louis B. Carl, superintendent of the waterworks and electric light plant of

that city. The defendant alleges a counterclaim of $2,500, the amount paid by it to the city of Marshfield on account of the giving of this bond. The defendant alleges that the amount of $2,500 was deposited by the mother and sister of Louis B. Carl with the plaintiff, and that this was a trust fund in the plaintiff's hands created to cover alleged shortages in the accounts of Louis B. Carl, and that the defendant has the right to have so much of the fund paid to it as will reimburse it for the amount it paid to the city of Marshfield under the obligation of its bond. Defendant denies liability to the plaintiff for $452.03, upon the ground that the defendant derived no benefit from the plaintiff's services and that the plaintiff neglected to protect the defendant's interests committed to his charge.

The plaintiff is an attorney at law practicing his profession in Grand Rapids, Wisconsin. The defendant is a corporation engaged, among other things, in the writing of fidelity and surety bonds and is licensed to transact business in Wisconsin. Plaintiff had acted as local attorney for defendant for some time prior to the time he was engaged in the matters concerning the defendant's liability on the bond in question.

On August 23, 1909, defendant executed a fidelity bond wherein it insured the city of Marshfield, Wisconsin, in the amount of $2,500 against loss resulting from any act of dishonesty amounting to larceny or embezzlement on the part of Louis B. Carl as superintendent of the waterworks and electric light department of that city. In the early fall of 1913 charges of defalcation were made against Louis B. Carl by the city of Marshfield, which resulted in his arrest. Demand was immediately made upon the defendant company by the city of Marshfield to reimburse the city for the alleged shortages of Louis B. Carl. A special agent of the company, Edward J. Roche, was sent to Marshfield and he engaged the plaintiff to represent the company's interest in regard to

the alleged default of Mr. Carl. The plaintiff alleges that it was agreed between him and Mr. Roche that the plaintiff should confer with Mr. Carl, who was then in the Wood county jail, and if he determined that Mr. Carl had any defense he was to defend the defendant company and Mr. Carl. Plaintiff thereupon engaged to defend Mr. Carl in the criminal action. This fact was communicated by letter to Mr. Lang, defendant's vice-president.

Herman Carl of Troy, New York, the father of Louis B. Carl, was liable to the amount of $1,500 to the defendant company on his bond of indemnity. On November 5, 1913, the sum of $2,500 was sent by Mrs. Herman Carl, the mother of Louis B. Carl, and by Marie Carl, his sister, to Mrs. Louis B. Carl of Marshfield at the request of Louis B. Carl. This sum Mrs. Carl deposited in a bank, thereafter indorsing the certificate of deposit for this amount to the plaintiff. He deposited this certificate in the Citizens' National Bank of Grand Rapids as attorney for the defendant company.

In February, 1914, the city of Marshfield, through its attorney, threatened that if the bonding company did not pay the city the amount of the bond they would appeal to the insurance commissioner of the state of Wisconsin to have its license revoked, and on February 24, 1914, against the advice of the plaintiff, the defendant paid to the city of Marshfield the sum of $2,500. The plaintiff refused to reimburse the defendant company out of the fund transferred to him by Mrs. Louis B. Carl which she had received from Mrs. Herman Carl and Marie Carl, alleging that she held the fund for the protection of Louis B. Carl and to secure immunity of Carl from the alleged defalcation and to defend him in the criminal action then pending on account thereof.

The plaintiff defended Louis B. Carl in the criminal prosecution, in which he was acquitted of the charge of larceny and embezzlement of the city's funds. The defendant refused to pay the plaintiff his claim for services and disburse-

ments as its attorney in the matter, and counterclaimed, in his action to recover for his services, for $2,500, which it alleges the plaintiff wrongfully retains in his possession.

The case was tried to the court and jury. The jury returned a special verdict finding (1) the plaintiff was entitled to recover for services and disbursements as attorney for the defendant in the matter of the alleged defalcation of Louis B. Carl the sum of $405.40, and (2) that the $2,500 which the defendant seeks to recover of the plaintiff as a counterclaim in the action was not sent to Mrs. Carl to be used solely and only to discharge any liability of Louis B. Carl and Herman Carl to the defendant and to adjust claims of the city of Marshfield against the said Louis B. Carl.

Upon the verdict of the jury the trial court awarded judgment in the plaintiff's favor for the sum of $452.03 damages and dismissed the counterclaim of the defendant.

For the appellant there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Emmet Horan, Jr.,* of counsel, all of Milwaukee, and oral argument by *Mr. Horan* and *Mr. Jackson B. Kemper.*

For the respondent there was a brief by *Goggins, Brazeau & Goggins* of Grand Rapids, and oral argument by *T. W. Brazeau* and *Hugh W. Goggins.*

SIEBECKER, J. The principal controversy on this appeal involves the defendant's right to recover the sum of $2,500 upon its counterclaim. As appears from the foregoing statement, the claim is made against the plaintiff on the ground that he has in his possession a fund of this amount for the benefit of the defendant company and that he now wrongfully retains the same to the defendant's injury. The jury's finding as to the defendant's right to such fund negatives the defendant's claim that it has any beneficial interest in or right to recover the fund. The evidence of the case is so voluminous and involved that a recital of the substance of it

here cannot be undertaken nor would it serve any useful purpose.

The trial court correctly held that the evidence does not present a dispute but that the plaintiff was retained by the defendant company as its attorney in the matter of the alleged defalcation of Louis B. Carl as superintendent of the Marshfield electric light plant and waterworks, and properly submitted to the jury for determination whether or not the plaintiff rendered any service of value and necessarily expended money in performing services, and if so that they were to determine the value and amount thereof. This inquiry was, under the evidence, one for the jury. Their finding on this question cannot be disturbed as against the evidence.

The defendant contends that the court erred in dismissing its counterclaim for the reason that the evidence shows that the $2,500 fund the plaintiff received from Mrs. Louis B. Carl was received by him for its benefit, while the plaintiff was acting as its attorney in the Carl matter, to pay any shortage of Louis B. Carl to the city of Marshfield and to discharge Carl's liability to the defendant under its bond and Herman Carl's liability on an indemnity bond for $1,500 he gave the defendant. The effect of the jury's finding on this issue is against the defendant's claim and sustains the plaintiff in his contention that the money was not received by him for this purpose, but that he received it pursuant to an agreement with Louis B. Carl and his wife for Carl's protection in the matter in controversy, and that it was the money of Louis B. Carl. We have read the evidence attentively and studied it with care in the light of these respective claims of the parties to the action, and under the facts and circumstances shown we are led to the conclusion that the jury were amply sustained in their finding of the facts upon the issues submitted to them for determination. The letter of Louis B. Carl of October 31, 1913, to his

mother, the evidence of his mother and sister explaining the transaction of sending the money to Louis's wife, and the letters acknowledging receipt thereof and the uses to which the funds were to be devoted clearly permit of the inference that the mother and sister loaned Louis the money for the purpose of having him use it for his protection and to discharge his liabilities arising out of the alleged defalcation covered by the defendant's fidelity bond and the father's bond of indemnity to the defendant. Under the facts and circumstances of the case it cannot be said that the mother and sister intended, and that Louis B. Carl and his wife understood, that this money was to be held by Mrs. Louis Carl for the sole purpose of applying it in payment of any liability of Louis B. and Herman Carl to the defendant arising under the defendant's liability bond. While the evidence in the case permits of different and conflicting inferences, this court cannot say that the trial court and jury are clearly wrong in their determination of the issue of fact, and hence their determination must stand in this case. The defendant's claim asserting a beneficial interest to this fund is that the fund is impressed with a trust for discharging the obligation arising under its fidelity bond. The evidence is too vague and uncertain to compel this court to reverse the trial court and jury on this question. We are satisfied that the result of the trial on this issue is justified by the record and that the transaction between Louis B. Carl and his mother and sister is in effect a loan to Louis B. Carl, and that he and his wife had the right to use the fund as they did.

It is also contended that the plaintiff received the fund as defendant's attorney and that he has wrongfully converted it to his own use to the defendant's damage. The fact that Mrs. Louis B. Carl indorsed the certificate of deposit to the plaintiff and his deposit thereof as the attorney of the defendant is fully explained. It appears that this was done for the sole purpose of preventing garnishment of the

fund by Louis B. Carl's creditors. The evidence is practically undisputed that when the plaintiff received the fund from the Carls it was with the understanding that he was to use it for the benefit, protection, and aid of Louis B. Carl in the defense of the criminal action and other actions against him. The evidence of Mr. Calkins, who procured the certificate from Mrs. Carl, is plain and unequivocal as to the terms and conditions upon which it was turned over by the Carls. It is clear from the facts material to this inquiry that the plaintiff did not receive the fund from the Carls to hold as the attorney or agent of the defendant, but that he received it and was to hold it for Louis B. Carl and to use it so far as necessary in defending the criminal action and to protect Herman Carl against liability on his indemnity bond, and to discharge any liability so far as possible should it be found that Louis B. Carl, as superintendent of the waterworks and electric light plant, was liable for embezzlement or larceny. Under this state of the case no question of the plaintiff's liability for the fund in his capacity of attorney or agent can arise.

An exception to the court's exclusion of evidence offered by the defendant to show that Louis B. Carl is guilty of larceny or embezzlement of city funds covered by the defendant's bond is urged as error on this appeal. It is claimed that this evidence was improperly rejected under the issues raised by the plaintiff's denial of the defendant's charge in its counterclaim that he holds the fund for the purpose of discharging any liability of Louis B. Carl to the defendant. As above shown, the plaintiff does not hold the fund for such purpose, and hence the exception is not well taken on this ground. It appears that the plaintiff did agree to pay any liability that might be established against Herman Carl on his indemnity bond. This, however, does not require the plaintiff to litigate the question of Louis B. Carl's guilt of larceny or embezzlement as such city employee. The

question of the liability of Herman Carl to the defendant in the indemnity bond can only arise if Louis B. Carl is found guilty of larceny or embezzlement of city funds which came to his hands as superintendent. The only action in which this arose was the criminal action in which Louis B. Carl was acquitted. The question of liability between Louis B. Carl and the defendant bonding company as surety for Carl's fidelity has not been litigated.

Under these circumstances such liability is not properly an issue to be determined upon the defendant's counterclaim in this action to which Louis B. Carl is not a party. The issue properly triable in this action can involve only the contract out of which arose the plaintiff's claim for services and any counterclaim of the defendant arising out of the transaction, or a cause of action in the defendant's favor arising out of the contract and existing at the commencement of this action. No liability of Herman Carl on his indemnity bond has been established up to this time, and the defendant cannot assert it until it has been legally established that Louis B. Carl is liable for the larceny or embezzlement of the city's funds in his custody as superintendent of the light and water plant.

The contention that the court improperly allowed interest to the plaintiff on the amount awarded him for services from the date of demand made by him to the date of the entry of judgment is not sustained. This was a proper charge under the facts shown. These views of the case determine all material questions on this appeal and render discussion of other matters presented in the briefs unnecessary. We find no reversible error in the record.

By the Court.—The judgment appealed from is affirmed.

ROSENBERRY, J. (*dissenting*). Assuming that the verdict of the jury should not be disturbed, it appears without dispute, as stated in the opinion of the court, "that the plaint-

iff did agree to pay any liability that might be established against Herman Carl on his indemnity bond." I dissent from the conclusion reached that the defendant guaranty company cannot establish as a fact in this action that such liability does exist. I can see no reason why that issue cannot as well be litigated in this action as in any other. It is undisputed that Louis B. Carl has surrendered any claim which he had against this fund, and the sole question for determination is the right of the plaintiff to retain it. It is undisputed that Herman Carl, the father of Louis B. Carl, had given to the defendant guaranty company an indemnity bond in the sum of $1,500, and that $1,500 had been paid to the plaintiff as the attorney of the defendant guaranty company for the purpose of protecting Herman Carl from any liability upon his bond which might be established by reason of the breach of the bond issued by the defendant guaranty company to the city of Marshfield for Louis B. Carl. I think the defendant guaranty company should have the right to establish its claim to that fund in this action and not be compelled to litigate that question with Louis B. Carl, and thereafter perhaps be compelled to bring a separate action against the plaintiff herein.

WINSLOW, C. J., concurs in the foregoing dissenting opinion.

ESCHWEILER, J. (*dissenting*). I concur in the dissent by Justice ROSENBERRY. I wish also to add that I am satisfied that the second question of the special verdict did not dispose of the vital question of fact, which was whether $1,500 included in the $2,500 sent Louis Carl was to be used as indicated in that question. The answer to that question by the jury finding that the whole sum of $2,500 was not so sent is entirely consistent with an affirmative answer as to the $1,500. The mother and sister were greatly interested

in keeping from the old father the news of his son's trouble and the possibility of his liability to the extent of the $1,500 bond given to the defendant. Actuated by these motives, as well as interest in the son and brother, they sent on the money in answer to Louis's letter of October 31st, which contains this significant language: "He [referring to plaintiff] claims that he can get me free if we pay this money back" (meaning to the city). Money sent for such a purpose could not be lawfully diverted to other purposes by Louis Carl without the consent of the senders.

It appears to me that there arose a clear-cut conflict of duty on plaintiff's part as to this fund. It came into his hands impressed with a trust. He used the same for his own benefit. I think the defendant was entitled to the $1,500.

FONTAINE, Appellant, vs. COOLEY, Respondent.

April 4—April 24, 1917.

Libel: Newspaper publication: Questions for jury: Harmless error: Evidence.

1. Although a newspaper publication concerning plaintiff was libelous *per se*, the error in submitting to the jury the question whether it was libelous or not was not prejudicial to plaintiff where the jury found it libelous and awarded damages.
2. Certain other newspaper publications concerning plaintiff not being libelous *per se*, the submission to the jury of the questions whether they were libelous and whether they were true, and the admission of evidence as to those issues, was not error.

APPEAL from a judgment of the circuit court for Wood county: BYRON B. PARK, Circuit Judge. *Affirmed.*

Action for libel. Three alleged causes of action are set out in the complaint. The first cause of action is for the publication in the Daily Leader, published [in Grand Rapids,

Wisconsin] by the defendant, of an article on the 19th day of November, 1915, which is entitled "What Did He Really Intend to Do?" and another article in the same issue entitled "That Court House Sensation."

The second cause of action is for the publication of an article in the Daily Leader on the 22d of November, 1915, entitled "Why Should We Shield Him?" and an article in the issue of November 23, 1915, entitled "Don't Believe It."

The third cause of action is for the publication in the Wisconsin Valley Leader on November 25, 1915, of the article "That Court House Sensation" and the article "Why Should We Shield Him?" and the article "Don't Believe It."

The defendant answered admitting the ownership of the papers in which the alleged articles were published and that they had a large circulation. The answer further alleges that the articles referred to the payment to the plaintiff of $214.70 by the county treasurer and the county clerk of Wood county on and prior to the 15th day of November, 1915, which was in fact a re-payment of two bills which had been paid prior thereto, and alleges that the statement regarding said matter contained in said alleged defamatory articles was true. Some additional facts were alleged in the answer with reference to other payments to the plaintiff by the county clerk and county treasurer. The answer denies that it charged the plaintiff with knowingly and fraudulently converting to his own use moneys of the county of Wood or that he was guilty of larceny, and denies that it at any time charged plaintiff with fraudulently receiving or converting to his own use any sum whatever. Some other matters are alleged in the answer not necessary to recite here.

At the close of the evidence the plaintiff moved that only the question of damages be submitted to the jury, on the ground that the articles were libelous *per se* and that no justification had been shown.

The court submitted a special verdict. The jury found as follows:

"(1) Would a person of average comprehension, upon reading the articles set forth in the plaintiff's first cause of action, ordinarily have understood that plaintiff was by said articles accused of knowingly taking and converting to his own use the overpayment of $214.70? *A.* Yes.

"(2) Do the articles set forth in the first cause of action, construed in the plain and popular sense in which the words therein would naturally be understood, and considering the scope and object of the entire articles, contain accusations tending to subject the plaintiff to social disgrace, public distrust, hatred, ridicule, or contempt? *A.* Yes.

"(3) If you answer questions 1 and 2, or either of them, 'Yes,' then answer this question: Were the accusations against the plaintiff contained in said articles true? *A.* No.

"(4) If the court should be of the opinion that plaintiff should recover on the first cause of action, at what sum do you assess the plaintiff's compensatory damages? *A.* $100.

"(5) Was the defendant actuated by express malice against the plaintiff in causing said articles to be published? *A.* No.

"(6) If you answer question 5 'Yes' and determine to assess punitory damages, then answer this question: At what sum do you assess plaintiff's punitory damages? *A.* ——.

"(7) Would a person of average comprehension, upon reading the article set forth in the plaintiff's second cause of action, ordinarily have understood that plaintiff was by said article accused of knowingly taking and converting to his own use moneys of the county? *A.* No.

"(8) Does the article set forth in the second cause of action, construed in the plain and popular sense in which the words therein would naturally be understood and considering the scope and object of the entire article, contain accusations tending to subject the plaintiff to social disgrace, public distrust, hatred, ridicule, or contempt? *A.* No.

"(9) If you answer questions 7 and 8, or either of them, 'Yes,' then answer this question: Were the accusations against the plaintiff contained in said article true? *A.* Not answered.

"(10) If the court should be of the opinion that plaintiff

should recover on the second cause of action, at what sum do you assess the plaintiff's compensatory damages? *A.* Nothing.

"(11) Was the defendant actuated by express malice against the plaintiff in causing said article to be published? *A.* ——.

"(12) If you answer question 11 'Yes' and determine to assess punitory damages, then answer this question: At what sum do you assess plaintiff's punitory damages? *A.* ——.

"(13) Would a person of average comprehension, upon reading the articles set forth in the plaintiff's third cause of action, ordinarily have understood that plaintiff was by said articles accused of knowingly taking and converting to his own use the overpayment of $214.70? *A.* No.

"(14) Do the articles set forth in the third cause of action, construed in the plain and popular sense in which the words therein would naturally be understood and considering the scope and object of the entire articles, contain accusations tending to subject the plaintiff to social disgrace, public distrust, hatred, ridicule, or contempt? *A.* No.

"(15) If you answer questions 13 and 14, or either of them, 'Yes,' then answer this question: Were the accusations against the plaintiff contained in said articles true? *A.* ——.

"(16) If the court should be of the opinion that plaintiff should recover on the third cause of action, at what sum do you assess the plaintiff's compensatory damages? *A.* Nothing.

"(17) Was the defendant actuated by express malice against the plaintiff in causing said articles to be published? *A.* No.

"(18) If you answer question 17 'Yes' and determine to assess punitory damages, then answer this question: At what sum do you assess plaintiff's punitory damages? *A.* ——."

Judgment was rendered upon the verdict in favor of the plaintiff for $100 damages and costs, and plaintiff appealed.

For the appellant there was a brief by *Goggins, Brazeau & Goggins* of Grand Rapids, and oral argument by *T. W. Brazeau* and *Hugh W. Goggins.*

Geo. L. Williams of Grand Rapids, for the respondent.

KERWIN, J. The main contention of the appellant is that the publication set up in each cause of action is libelous *per se* and that the court should have so instructed the jury.

We are of opinion that the publication set up in the first cause of action is actionable *per se,* but as to the second and third causes of action the questions were for the jury, and the jury found the publications not actionable.

While it was error to submit the question of whether the publication set up in the first cause of action was libelous or not, the error was not prejudicial under the finding of the jury in favor of appellant and award of damages to him.

The appellant argues the errors assigned under two heads, viz.: (1) failure of the court to hold the articles set up in the second and third causes of action libelous *per se;* and (2) in submitting to the jury whether libelous or not and whether true or not. These issues were proper under the pleadings, and the evidence submitted under them was non-prejudicial. Counsel for appellant complains of a "flood of evidence" admitted which it is claimed prejudiced the jury and should have been excluded. If counsel for appellant were correct in his contention that the publications set up in the second and third causes of action are actionable *per se,* then there would be force in the contention; but since this court holds that the articles set up in the second and third causes of action are not libelous *per se,* the evidence was competent and no prejudicial error was committed in admitting it.

The case seems to have been fairly tried and no prejudicial error committed.

By the Court.—The judgment is affirmed with costs.

WILL OF OLSON: BURO and others, Appellants, vs. OLSON and others, Respondents.

April 4—April 24, 1917.

Wills: Construction: Precatory words: Devise to wife: Life estate or fee? Conditional remainder: Performance of condition: Intentional omission of grandchild: Evidence: Sufficiency.

1. Where it is necessary to follow precatory words in a will in order to carry out the testator's clear intention, such words are not advisory but mandatory.
2. A will giving all of testator's "real and personal property" to his wife "with full power and control of the same," stated that "after the death of my said wife it is my wish that what remains of the property shall be divided equally between my three sons [naming them], upon the express condition that my said sons shall during the lifetime of my said wife assist her in operating the farm and taking care of the property, also to pay to each of my four daughters" and another son certain legacies in cash. *Held*, that the wife took a life estate coupled with the power to dispose of the *corpus* of the property if necessary for her maintenance, with remainder over to the sons named upon the condition specified.
3. The condition that the sons should assist the mother during her life is not so vague that a court cannot determine the question of its performance; and in an action to construe the will, brought after her death, the evidence is *held* to sustain a finding that such condition had been complied with.
4. A further finding in such action that a granddaughter was intentionally omitted from the will is *held* to have sufficient support in the evidence.

APPEAL from a judgment of the circuit court for Dunn county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

Action to construe the will of Erick Olson, begun in the county court of Dunn county and appealed to the circuit court for said county. The parts of the will upon which a construction is prayed for are as follows:

"1. . . . I give and bequeath to my beloved wife, Mary Olson, all my property both real and personal property, with full power and control of the same. 2. After the death of

my said wife it is my wish that what remains of the property shall be divided equally between my three sons, *Carl Olson, Alfred Olson,* and *Ingwald Olson,* upon the express condition that my said sons shall during the lifetime of my said wife assist her in operating the farm and taking care of the property, also to pay to each of my four daughters, *Mrs. Ida Wallender, Mrs. Lise Bergum, Inga Olson,* and *Nellie Lindseth,* the sum of $100, and to pay to my son *Edward Olson* the sum of $300."

Erick Olson died in 1910 and his wife in 1914. The county court held that the widow did not take a fee, but a life estate coupled with the power to dispose of the *corpus* if necessary, and that upon her death the property remaining should be divided as directed in the second paragraph of the will—the sons having fulfilled the conditions thereof. A granddaughter, *Olga Marie Buro,* was found by the county court to be intentionally omitted from the will. Upon appeal to the circuit court the judgment of the county court was affirmed, and from such judgment of affirmance *Olga Marie Buro, Nellie Lindseth, Ida Wallender,* and *Lise Bergum* appealed.

For the appellants there was a brief by *J. C. Ticknor* of Menomonie and *Solem & Solem* of Minneapolis, Minnesota, and oral argument by *Mr. Louis Solem* and *Mr. Ticknor.*

J. C. Gilbertson of Eau Claire, for the respondents *Carl, Alfred,* and *Ingwald Olson.*

VINJE, J. Appellants urge that the widow took a fee, and that upon her death, intestate, the property descended to her heirs; that the second paragraph of the will is too vague to change to a mere life estate the definite language of the first paragraph which devises a fee, and that the conditions attached, to the effect that the sons should assist the mother in the management of the farm, render the whole paragraph void because no one can tell whether they have been performed. The first contention was negatived by this

court in *Knox v. Knox,* 59 Wis. 172, 18 N. W. 155. There the will read: "I give, devise, and bequeath unto my wife, M., her heirs and assigns forever, all my real and personal estate, . . . and hereby request that at her death she will divide equally, . . . between my sons and daughters [naming them], all the proceeds of my said property, real and personal, . . . hereby bequeathed;" and it was held that the widow took a life estate in the property coupled with a trust as to the remainder in favor of the children. In that case there was merely a request that at her death the wife divide the remainder. In the case at bar the testator himself divides it, leaving no discretion to the wife or to any one else. In *Jones v. Jones,* 66 Wis. 310, 28 N. W. 177, the rule in the *Knox Case* was reaffirmed. It has also been, either directly or indirectly, recognized in the following cases: *Derse v. Derse,* 103 Wis. 113, 79 N. W. 44; *Stuart's Will,* 115 Wis. 294, 91 N. W. 688; *Auer v. Brown,* 121 Wis. 115, 98 N. W. 966; *Schneider v. Schneider,* 124 Wis. 111, 102 N. W. 232; *Perkinson v. Clarke,* 135 Wis. 584, 116 N. W. 229; and *Hovely v. Herrick,* 152 Wis. 11, 139 N. W. 384. Where the intention of the testator is clear, and where, in order to carry out such intention, it is necessary to follow precatory words, then such words are not advisory but mandatory. *Knox v. Knox,* 59 Wis. 172, 18 N. W. 155; *Swarthout v. Swarthout,* 111 Wis. 102, 86 N. W. 558; *Wolbert v. Beard,* 128 Wis. 391, 107 N. W. 663. In *Tabor v. Tabor,* 85 Wis. 313, 55 N. W. 702, and in *Conlin v. Sowards,* 129 Wis. 320, 109 N. W. 91, the precatory words were held advisory merely. In the present case it seems clear that it was the intention of the testator that what remained of the property after the wife's death should be divided among his sons upon the payment of the legacies provided for in the will and the performance of the other conditions. Such being the intention, the wife was given a life estate coupled with the power to dispose of the *corpus* of the property if

necessary for her maintenance, with the remainder over to the sons named.

We see nothing uncertain or vague in the second paragraph; nor is the condition that the sons should assist the mother in the management of the farm incapable of ascertainment. Like any other fact, if in dispute, it can be determined by the court. It was so determined in this case, the court finding that the condition had been complied with. The evidence sustains such finding.

Claim is made that the granddaughter, *Olga Marie Buro,* was unintentionally omitted from the will. Both the county and circuit courts found to the contrary. The evidence on the subject is very meager, but what there is seems to sustain the findings made. We shall not attempt to review it here.

By the Court.—Judgment affirmed.

BURKHARDT MILLING & ELECTRIC POWER COMPANY, Respondent, vs. CITY OF HUDSON, imp., Appellant.

April 4—April 24, 1917.

Taxation: Recovery of illegal taxes: Bringing in new parties: Amendment of complaint: Limitation of actions: Appeal: Direction of judgment.

1. Where, in an action to recover illegal and excessive taxes paid to a city, the plaintiff, upon being required to bring in other parties defendant, amended the complaint accordingly, but stated identically the same cause of action against the city as was before stated, the action against the city is not barred by the mere fact that the amended complaint was served and the new parties brought in after the year limited by sec. 1164, Stats., for the bringing of the action.
2. The right of plaintiff to recover in this action having been established, the amount of recovery being merely a matter of computation, and the case having been twice before the circuit

court and twice before the supreme court, the latter court, upon affirming an order overruling a demurrer to the amended complaint, directs a judgment for the plaintiff upon such complaint.

APPEAL from an order of the circuit court for St. Croix county: E. B. BELDEN, Judge. *Affirmed.*

Demurrer to the plaintiff's second amended complaint. Demurrer overruled. The defendant *City of Hudson* appeals.

The cause was submitted for the appellant on the brief of *C. A. Cross* and *N. O. Varnum* of Hudson, and for the respondent on that of *Spencer Haven* of Hudson.

ROSENBERRY, J. This case was once before this court and is reported in 162 Wis. 361, 156 N. W. 1011, where the facts are fully stated, and a restatement of the facts is not necessary here. Upon the return of the record to the circuit court pursuant to the directions of this court on the former appeal, the proper parties were brought in, the necessary amendment made, and the directions of this court fully complied with. Every matter urged upon our attention on this appeal was determined adversely to the contention of appellant here upon the former appeal, with one exception. The case was first started by plaintiff against the *City of Hudson* as sole defendant, and it is claimed that the bringing in of other parties subsequent to the reversal of the former judgment made a new cause of action which is barred by sec. 1164, Stats., and that the demurrer should have been sustained upon that ground.

The bringing in of the additional parties in no way affected the rights of the plaintiff as against the appellant *City of Hudson.* The cause of action against the *City of Hudson* is identical with the cause of action against said city as stated in the former complaint. We think it clear, therefore, that it is not barred by the provisions of sec. 1164. The right of plaintiff to recover in this action having been estab-

lished, the amount of recovery being merely a matter of computation, and this case having been twice before the circuit court and twice here, we are of the opinion that public interest requires that this litigation be terminated.

By the Court.—The order of the circuit court appealed from is affirmed, with directions to enter judgment for plaintiff upon its complaint.

DREGER, Respondent, vs. TARRANT, Executor, Appellant.

April 4—April 24, 1917.

Master and servant: Recovery for services: Receipt in full procured by fraud: Evidence: Limitation of actions: Pleading: Setting aside waiver: Discretion: Claims against decedent.

1. In an action to recover the value of services as a farm hand, the evidence is *held* to sustain a finding by a referee, confirmed by the trial court, to the effect that there was fraud on the part of the employer in procuring the execution by plaintiff of receipts which purported to be in full of all demands.
2. Failure of the defendant in such case to plead the statute of limitations either by an answer or by demurrer was a waiver of that defense.
3. The original defendant having died after the trial of the case before a referee, and her executor, after the action had been revived, having adopted and stood upon her answer, which did not plead the statute of limitations, there was no abuse of discretion in refusing to set aside the waiver and permit such statute to be pleaded by the executor after the case had been tried a second time and was ready for final judgment.
4. Sec. 3841, Stats. 1915, providing that no claim barred by the statute of limitations shall be allowed by the county court against an estate, is limited by its terms to claims presented in that court and has no application to an action brought in circuit court before the death of the testator.

APPEAL from a judgment of the circuit court for Pepin county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

The action is on implied contract to recover the value of

more than sixteen years of service as a farm hand. The action was brought in the lifetime of the defendant's testator, Mrs. M. L. Howard. The defenses pleaded were a general denial and settlement in full. The cause was referred to J. R. Matthews as referee to hear, try, and determine, and was tried during the lifetime of Mrs. Howard. She died, however, before the referee made his report. Thereupon the action was revived in the name of the defendant executor, a supplemental complaint was filed by the plaintiff, the defendant adopted and stood upon the answer already served and filed, and the cause was again referred to the same referee and tried upon the testimony taken on the previous hearing.

The referee reported that the plaintiff performed work as an ordinary farmhand for Mrs. Howard for a period amounting to sixteen years and two months between January 1, 1894, and January 1, 1913, without agreement as to the price, and that such services were reasonably worth $23 per month, amounting in the aggregate to $4,462; that payments had been made thereon amounting to $1,839.30; that receipts were given by the plaintiff on the making of two of said payments dated respectively January 6, 1900, and February 10, 1913, each of which contained the words "in full of all demands;" that Mrs. Howard was an intelligent, self-reliant, strong-minded person, while the plaintiff is ignorant, dull, and unable to read or write except to write his name in German; that Mrs. Howard drew said receipts but did not explain their contents to the plaintiff; that plaintiff kept no accounts, did not know the value of his services nor the amount which had been paid thereon, and signed the receipts believing them to be only receipts for the property or money named in them; that there was fraud on the part of Mrs. Howard in procuring the execution of said receipts, and that they should be set aside so far as they purported to be receipts in full; that the statute of limitations had not been pleaded

as a defense in the action; and that the balance due at the time of the commencement of the action was $2,622.70, for which sum, with interest and costs, judgment should be rendered in favor of the plaintiff.

The court confirmed the report of the referee, and rendered judgment accordingly.

For the appellant there was a brief by *C. M. Hilliard* of Durand, attorney, and *Freeman & Freeman* of Menomonie, of counsel, and oral argument by *Mr. Hilliard.*

For the respondent the cause was submitted on the brief of *W. E. Plummer* of Durand.

WINSLOW, C. J. In this case it is held:

1. The findings of fact are amply supported by the evidence and hence cannot be set aside.

2. In view of the long and intimate relations of the parties, the disparity in their intelligence, mental force, and education, the trust which the plaintiff evidently placed in the deceased, and the influence she had over him, it is considered that the conclusion that the deceased fraudulently procured his signature to the receipts is justified by the evidence.

3. The defense of the statute of limitations was waived by the testator by failure to set it up by answer or demurrer. Sec. 4206, Stats.

4. There was no abuse of discretion in refusing to set aside the waiver and permit the statute to be pleaded by the executor, inasmuch as the executor had adopted the answer of the deceased. The case had been twice tried and the action was ready for final judgment when the motion was made.

5. Sec. 3841, Stats. 1915, providing that no claim barred by the statute of limitations shall be allowed by the county court against an estate, is limited by its terms to claims presented in that court and has no application to an action brought in circuit court before the death of the testator.

By the Court.—Judgment affirmed.

BARNARD, Appellant, vs. COHEN and another, Respondents.

April 5—April 24, 1917.

Appeal: Reversal of judgment: Nominal damages: Punitory damages: Libel.

1. An erroneous judgment will not be reversed when recovery is for no more than a nominal amount.
2. In an action for libel punitory damages cannot be recovered where the compensatory damages are merely nominal.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action for libel. The case was submitted to the jury under proper instructions and the jury returned the following verdict:

"We, the jury, duly impaneled to try the issues in the above entitled action, find for the plaintiff, *James Barnard,* and assess his damages as follows:

"Compensatory damages, ——.
"Punitory damages, $300."

Thereupon plaintiff moved (1) for judgment in his favor; (2) that the verdict be amended by inserting the words "six cents" in the space reserved for compensatory damages; and (3) in case both motions be denied, for a new trial. Defendants moved for judgment upon the verdict. The trial court denied all of the motions, and upon its own motion amended the verdict by inserting the words "six cents" in the space reserved for compensatory damages and entered judgment upon the amended verdict for plaintiff for the sum of six cents damages and six cents costs. From the judgment so entered plaintiff appeals.

For the appellant there were briefs by *Hill & Spohn* of Madison, and oral argument by *W. H. Spohn.*

For the respondents there was a brief by *Jones & Schubring* of Madison, and the cause was argued orally by *Burr W. Jones.*

ROSENBERRY, J. There was a demurrer to the complaint which was overruled. The defendant assigns this as error, but in the view we take of the case that question is immaterial. An erroneous judgment will not be reversed where recovery is for no more than a nominal amount. *Riess v. Delles,* 45 Wis. 662.

The principal question presented is: In an action for libel, can there be a recovery of punitory damages if only nominal compensatory damages are found?

Upon this question there is a conflict in the authorities. In the following cases it is held there may be such recovery: *McConathy v. Deck,* 34 Colo. 461, 83 Pac. 135; *Lampert v. Judge & Dolph D. Co.* 238 Mo. 409, 141 S. W. 1095. The following cases hold that there may not be such a recovery: *First Nat. Bank v. Kansas G. Co.* 60 Kan. 30, 55 Pac. 277; *Kuhn v. C., M. & St. P. R. Co.* 74 Iowa, 137, 37 N. W. 116; *Meidel v. Anthis,* 71 Ill. 241. This court is committed to the doctrine that punitory damages cannot be recovered in an action where the compensatory damages are merely nominal. We think this rule is based not only upon authority but upon the better reason. *Barber v. Kilbourn,* 16 Wis. 485; *Maxwell v. Kennedy,* 50 Wis. 645, 7 N. W. 657. See, also, *Bass v. C. & N. W. R. Co.* 42 Wis. 654, 672.

By the Court.—Judgment affirmed.

WHITE and another, Administrators, Respondents, vs. BROTHERHOOD OF LOCOMOTIVE FIREMEN, Appellant.

April 5—April 24, 1917.

Death: Presumption after seven years: Time of death: Evidence: Life insurance: Benefit societies: Proof of death: Notice of disappearance, when not necessary: Assessments paid after death: Recovery.

1. There is no presumption of the death of a person until the expiration of seven years after he was last heard from, and after

such seven years there is no presumption either of life or of death at any particular time during the seven years, in the absence of evidence raising such presumption.

2. The question at what particular time during said period of seven years a person died is one of fact to be determined by a court or a jury; and in this case the evidence is *held* to sustain a finding by the trial court that the death occurred shortly after the person was last heard from.

3. A certificate of insurance issued by a fraternal benefit society provided that "all rights of action by the beneficiary . . . shall be absolutely barred unless proof of death . . . shall be made within sixty days from the time said beneficiary has acquired knowledge of the fact of the death of said member." The member disappeared, having been last heard from in 1901. In an action brought upon the certificate in 1915, defendant denied that the member was dead. The court found that the beneficiary had no knowledge of the death; that all the facts as to the disappearance were known to the secretary of the local lodge and had been by him laid before the grand secretary of the society; and that payment of the dues and assessments had been continued by the advice of the officers of the lodge. Both parties considered the contract valid up to the time the action was brought. *Held*, that defendant could not repudiate it under the provision above quoted.

4. It being the duty of the officers of the local lodge, under the by-laws of the society, to make the certificate and proofs of death in such a case, it was not necessary, in view of the knowledge which those officers and the grand secretary possessed, that the beneficiary should have given formal notice to the society of the disappearance of the insured.

5. Assessments paid by the beneficiary after the death of insured and before her own death were recoverable in the action brought by the administrators of the beneficiary.

APPEAL from a judgment of the circuit court for Sauk county: JAMES O'NEILL, Judge. *Affirmed.*

This is an action to recover upon a certificate of insurance issued by appellant to one T. J. White, the respondents being the sisters and alleged heirs of said T. J. White. The case was tried by the court and the following findings made:

That T. J. White never married, and made his home with his mother at Winona, Minnesota; that he was sober and industrious, lived on affectionate terms with the family, and

wrote to his parents and sisters on an average of once in six weeks or two months; that he saved considerable money and provided for the support of his parents, and when he left for North Dakota in 1900 he had $150 in the bank at Winona upon which he gave his mother permission to draw; that he was last heard from in Vale, Iowa, in 1901, when his brother-in-law received a letter from him, and that his sister sent him at Vale, Iowa, a letter from a contractor in Montana who sought to employ him in some railroad construction work in Montana; that on February 18, 1901, while T. J. White was absent in Vale, Iowa, the certificate of 1895 was surrendered by *Hannah White,* a sister, and the policy of January, 1901, was delivered to her in lieu thereof; that Ellen White, the beneficiary, died July 18, 1904, at Winona, Minnesota, leaving as her only heirs-at-law her daughters *Hannah White* and *Margaret Nichols,* who were appointed as administrators of her estate by the Winona county court March 10, 1915; that T. J. White died in the year 1901, three years prior to the death of his mother, Ellen White; that the mother and sister made inquiries and caused them to be made, and caused a notice to be inserted in a magazine published by defendant company in 1903 and in 1905 and 1908, to discover if he was living, and discovered nothing by reason thereof; that witness Snyder was secretary of the lodge at Waseca at the time of White's disappearance and up to the time of trial, and the disappearance and absence without tidings were known to said Snyder and to other members of Waseca Lodge from date of disappearance, and at the request of *Hannah White* the facts and circumstances of his disappearance were laid before Mr. Carter, a general officer of the order, at the Milwaukee convention in 1906; that defendant has demanded and collected from Ellen White and her heirs the assessments which fell due upon the policies up to September, 1915, with full knowledge of the facts and without objection; that it was the duty of the local lodge, when

the death of a member came to the attention of its secretary, to make proof of claim, but that Snyder as such secretary, with knowledge of his disappearance, failed to do so, but advised *Hannah White* in 1906 and two years ago to keep on paying the assessments, and because of such advice the assessments were paid; that it was unnecessary for Ellen White or her heirs to give notice to Snyder of the facts surrounding the disappearance of White, because such facts were known to Snyder at the time of the disappearance; that a claim for payment was made by the attorneys for *Hannah White* and *Margaret Nichols* and was finally rejected November 19, 1914; that after the appointment of plaintiffs as administrators of Ellen White's estate it was unnecessary to present further claim; that the amendment to section 76 of the constitution and by-laws of 1907 was legally adopted by defendant company and became effective January 1, 1907, but it in no wise affected plaintiffs' claim because of the death of White in 1901; that the plaintiffs should recover $41.80 dues paid by Ellen White between dates of death of T. J. White and Ellen White.

The court concluded that plaintiffs are entitled to recover $1,500, amount of the certificate, and $41.80 assessments and interest thereon; that the cause of action is not barred by either of the statutes of limitation pleaded by the defendant as a defense; that the action is not barred by any limitation provided by the constitution and by-laws of the defendant organization or by any certificate issued to T. J. White; that defendant has at all times since May 6, 1901, treated the contract as being in full force and effect and demanded and accepted all dues and assessments and is estopped from setting up a defense of the statute of limitations and the limitations providing for the furnishing of proof and the commencement of the action; that the defendant finally rejected the claim November 19, 1914, and refused to pay anything on account of the death of insured, when proof of death

was based upon the presumption arising from absence without tidings, and it was unnecessary for plaintiffs to make proof of death or formally present a claim.

Judgment was rendered in favor of the plaintiffs, with costs, from which this appeal was taken.

For the appellant there was a brief by *Bentley, Kelley & Hill* of Baraboo, and oral argument by *Frank R. Bentley.*

For the respondents there was a brief by *Grotophorst, Thomas, Rieser & Quale* of Baraboo, and oral argument by *H. H. Thomas.*

KERWIN, J. The findings set out in the statement cover all the issuable facts in the case.

1. It is strenuously contended by counsel for appellant that there is not sufficient evidence to support the finding to the effect that T. J. White died in the year 1901, three years prior to the death of his mother.

It is argued that since there is no presumption of death because of no tidings until the expiration of seven years and because of a presumption of continuation of life, it is not established that White died so short a time after he was known to be alive and well.

The well settled rule is that there is no presumption of death until the expiration of seven years after being heard from, and after seven years there is no presumption of either life or death at any particular time during the seven years in the absence of evidence raising such presumption. *Whiteley v. Equitable L. A. Soc.* 72 Wis. 170, 39 N. W. 369; *Wis. T. Co. v. Wis. M. & F. Ins. Co. Bank,* 105 Wis. 464, 81 N.W. 642; *Miller v. Sovereign Camp W. O. W.* 140 Wis. 505, 122 N. W. 1126.

In the instant case it is undisputed that White had been unheard of for more than seven years, and the material question is, At what particular time, during the seven years he was unheard of, did he die? This is a question of fact to

be determined by the trial court or a jury. *Whiteley v. Equitable L. A. Soc., supra; Miller v. Sovereign Camp W. O. W., supra; Butler v. Supreme Court I. O. F.* 53 Wash. 118, 101 Pac. 481; *Tisdale v. Connecticut Mut. L. Ins. Co.* 26 Iowa, 170.

The evidence tending to show that T. J. White died shortly after his disappearance is very strong and fully warranted the court below in finding that he died as found in 1901 and before the death of his mother, Ellen White.

2. The certificate in question and upon which this suit was brought provides:

"All rights of action by the beneficiary . . . shall be absolutely barred unless proof of death as required by said constitution shall be made within sixty days from the time that said beneficiary has acquired knowledge of the fact of the death of said member. . . . Any action under this certificate . . . by the beneficiary designated therein shall be absolutely barred unless such action shall be commenced in some court of competent jurisdiction within six months from the final rejection of the claim."

The court below found that the beneficiary named in the certificate had no knowledge of the death of White, and the defendant in its answer denied the death of White at the time alleged in the complaint or at any other time, and the court below found upon sufficient evidence that the secretary of the local lodge had knowledge of all the facts, and that the officers of the lodge advised plaintiffs to continue payment of the dues and assessments upon the certificate, which was done. Both parties considered the contract valid up to the time action was commenced, and the defendant, therefore, should not be permitted to repudiate it under the established facts in the case. *Palmer v. St. Paul F. & M. Ins. Co.* 44 Wis. 201; *Bennett v. Beavers R. F. Fraternity,* 159 Wis. 145, 150 N. W. 181.

3. It is further argued by appellant that the plaintiffs cannot recover because of failure to comply with the by-laws

of the defendant company providing for a notice and certificate of death and showing receipt for the last quarter's dues, etc. But an examination of these by-laws will show that in a case like the present it was the duty of the officers of the local lodge, under the circumstances of the case, to furnish this evidence to the company. In case of presumptive death a beneficiary cannot determine that death had resulted at any particular time. The facts with regard to the disappearance of White in 1901 were well known to the secretary of the local lodge and were communicated to the grand secretary of the association. In view of the established facts in this case no duty rested upon Ellen White to give formal notice to the order of the disappearance of her son, T. J. White. *Kelly v. A. O. H. L. Ins. Fund,* 113 Minn. 355, 129 N. W. 846.

4. It is further contended that all right of action was barred by the provision in the policy that any action thereunder should be absolutely barred "unless such action shall be commenced in some court of competent jurisdiction within six months from the final rejection of the claim." The court below found upon sufficient evidence that the claim was finally rejected on the 19th day of November, 1914, and that the action was commenced within six months from that date. The established facts dispose of the appellant's contention under this head.

5. Some contention is made to the effect that the cause of action is barred by the six- and ten-year statutes of limitation; also that the action should have been on a so-called 1907 certificate issued after the death of both T. J. White and his mother. These contentions are wholly without merit and do not require consideration.

6. The second cause of action sets up a claim to recover assessments paid by Ellen White after the death of T. J. White. Appellant contends, although we think not very seriously, that this money cannot be recovered. The amount

which the court below found plaintiffs are entitled to recover is $41.80, which amount was paid by Ellen White between the dates of death of T. J. White and Ellen White. We think it clear under the testimony and findings that the plaintiffs were entitled to recover this amount.

We are convinced that the case was fairly tried, no prejudicial error committed, and that the judgment below is right and should be affirmed.

By the Court.—Judgment is affirmed, with costs.

HAHN, Appellant, vs. HOLUM, Respondent.

April 5—April 24, 1917.

Libel: Privilege: "True and fair report" of a judicial proceeding: Lack of jurisdiction.

A newspaper publication stating that plaintiff had been tried before a justice of the peace for the theft of a harness and had been found guilty and fined was "a true and fair report" of a judicial proceeding, within the meaning of sec. 4256a, Stats., and therefore not actionable, although in fact the judgment pronounced by the justice was void for want of jurisdiction because no complaint had been filed as required by law.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Libel. The defendant is a justice of the peace and the editor of the De Forest Times, a newspaper published at De Forest, Dane county. The facts are: On April 19, 1915, the defendant as a justice of the peace issued a search warrant under ch. 197, Stats. The warrant required the officer to search the premises of the plaintiff and was executed by the village marshal, who, upon the search warrant, took into his possession a harness and also arrested the plaintiff. Plaintiff was taken before the defendant, who read him the

affidavit upon which the search warrant was issued and asked him to plead to it. The matter was then continued to April 26, 1915. The affidavit upon which the search warrant was issued was the only complaint ever made to or filed with the defendant against the plaintiff. Plaintiff was required to give a bond for his appearance on April 26th. Upon that day plaintiff appeared with his attorney, and against the objection of plaintiff and his attorney the defendant proceeded with the trial, took the testimony of a number of witnesses, and found plaintiff guilty of the theft of the harness and imposed a penalty. In the next issue of defendant's paper he published the following statement:

"*Asa Hahn* of the town of Vienna was tried before *Justice Holum* on Monday for the theft of a harness belonging to Mrs. Carrie Igard. The harness, identified by two sons of Mrs. Igard, was recovered with a search warrant. The defendant was found guilty and fined ten dollars and costs, the fine and costs amounting to about thirty-five dollars."

The judgment was reviewed upon a writ of *certiorari* issued out of the circuit court and was vacated and set aside on November 15, 1915. Plaintiff then commenced this action to recover damages for the publication of the alleged libelous article. At the close of plaintiff's case the trial court granted defendant's motion for a nonsuit, and from a judgment entered thereon dismissing the complaint plaintiff appeals.

J. J. McManamy of Madison, for the appellant.

For the respondent there was a brief by *Nelson & Bushnell* of Madison, and oral argument by *A. H. Bushnell.*

ROSENBERRY, J. The only question presented is: Is the item in question a publication of a judicial proceeding within the meaning of sec. 4256*a*, Stats.?

"Section 4256*a*. The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication in such newspaper of a true and fair report of any judicial, leg-

islative or other public official proceeding authorized by law or of any public statement, speech, argument or debate in the course of such proceeding."

It is claimed by appellant that it is not, for the reason that the judgment pronounced by the justice of the peace was void for want of jurisdiction, there having been no complaint filed as required by law. Had such a complaint been filed it is clear that the justice would have had jurisdiction, and it is not claimed that the judgment pronounced by him is not just and correct.

We are of the opinion that the item in question was a true and fair report of a judicial proceeding, and that defendant is entitled to the protection of sec. 4256*a*. It cannot be that the legislature intended to exempt such reports only when the judicial officer proceeds regularly in the manner prescribed by law, thereby placing upon the reporter the burden of determining at his peril whether or not a particular proceeding is regular and that the judicial officer pronouncing the judgment has jurisdiction to do so.

By the Court.—Judgment affirmed.

GRAVES, Appellant, vs. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Respondent.

April 6—April 24, 1917.

Accident insurance: Waiver of claim: Failure to give notice within time limited.

An accident insurance certificate issued by a fraternal benefit society provided that failure of the insured to send notice of an accident, within ten days thereafter, to the supreme secretary should constitute a waiver of the claim. The insured suffered an injury which he supposed to be trivial, but nine days later learned that it was serious. Although he was then able and had time to give the notice within the ten-day period, he did not

do so, but did give it within ten days after he learned that the injury was serious. *Held*, that under such circumstances he was bound by the literal terms of the contract and had waived his claim.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The defendant is a fraternal beneficiary society, and the plaintiff sues upon a certificate issued by it insuring him against bodily injury from accident. It appears by the complaint that the laws of the order, which are made part of the contract, provide that in case of accidental injury the insured member shall, within ten days thereafter, "send a notice in writing of said accident (not the result) to the supreme secretary," and that failure to send such notice shall constitute a waiver of the claim. It further appears by the complaint that on February 5, 1915, the plaintiff, while opening a can with a can opener, received a cut from a piece of tin, which he thought trivial at the time; that several days afterward and while he still believed the injury of no consequence he became disabled and continued to grow worse until the ninth day after the injury, when he called a physician (still supposing that his disability resulted from some other and independent cause), and then for the first time learned from the physician that his disability was caused solely by infection or blood poisoning which had set in from the injury; that he did not notify the defendant of the injury immediately after it happened nor within ten days from the date of receiving the same because he regarded it of no consequence, but that he gave the required notice within ten days after he was aware that said injury was causing the disability. The plaintiff was disabled for seven weeks. A general demurrer to the complaint was sustained and the plaintiff appeals.

For the appellant there was a brief by *Gilbert & Ela* of Madison, and oral argument by *Emerson Ela.*

For the respondent there was a brief by *Jones & Schubring* of Madison, attorneys, and *John A. Millener* of Columbus, Ohio, of counsel, and oral argument by *Burr W. Jones.*

WINSLOW, C. J. The question is a new one in this court; in fact we find no exact parallel for it in any court.

This court has held that such a clause as is here in question should be read with an exception saving the rights of an insured person who was totally incapacitated by unconsciousness from complying with it during the whole period (*Comstock v. Fraternal Acc. Asso.* 116 Wis. 382, 93 N. W. 22), and that the words "immediate notice," in case of a claim for a death loss, means as soon as practicable after the beneficiary obtains knowledge of the death of the insured. *Cady v. Fidelity & C. Co.* 134 Wis. 322, 113 N. W. 967. Both cases are founded upon the principle that a contract stipulation should not be construed so as to require the giving of a notice before it is possible to do so.

It is manifest that neither case is controlling here. The plaintiff knew he had received an injury and was physically able to give the notice, but did not do so because he thought it trivial. More than this, however; on the ninth day after the injury and while he still had ample time to "send a notice" as required by his contract, he learned that the injury was serious and had produced his disability. We do not suppose it would be claimed that, if he had learned this for the first time on the fourth or fifth day, the ten-day period would have been extended another ten days. Certainly this would not be reasonable, for in such case the ten-day limitation would amount to little. In all cases of minor injuries resulting seriously in the end the insured would have an easy method of escaping from his contract.

If the insured neither knew nor had reasonable ground for believing that his wound was other than trivial until after the expiration of the ten-day period, a different question

would be presented upon which the authorities seem to be in conflict. *Hatch v. U. S. C. Co.* 197 Mass. 101, 83 N. E. 398, 14 L. R. A. N. S. 503; *U. S. C. Co. v. Hanson,* 20 Colo. App. 393, 79 Pac. 176. See, also, *Phillips v. U. S. Ben. Soc.* 120 Mich. 142, 147, 79 N. W. 1. We intimate no opinion either way on this question.

We are well convinced, however, that, in a case like the present, where the insured was fully informed of the serious nature of the injury within the ten-day period and was entirely able to give the notice and had ample time to give it before the expiration of the period, he must be held to be bound by the literal terms of his contract. It is not a case of construing a contract so that it requires the impossible.

By the Court.—Order affirmed.

STATE EX REL. OWEN, Attorney General, Respondent, vs. WISCONSIN-MINNESOTA LIGHT & POWER COMPANY, Appellant.

April 6—April 24, 1917.

Water powers: Regulation of level and flow: Constitutional law: Validity of statute: Orders of railroad commission: Right of review not given to all parties affected: Taking of private property: Due process of law: Equal protection of the laws.

1. The Water Power Act of 1913 (ch. 755, Laws 1913; secs. 1596—50 to 1596—79, Stats. 1913), which, among other things, empowers the railroad commission "to regulate and control the level and flow of water in all navigable waters" of the state, was intended as a complete scheme for the control and supervision of dams, modifying, in so far as it conflicted therewith, franchises previously granted; and, by reason of its failure to give some of the parties adversely affected the right to test in the courts the validity of orders of the commission—compliance with which may mean practical confiscation of property, while for refusal to comply heavy penalties may be imposed,—the act is unconstitutional in that it permits the taking of private property without compensation and without due process of law, and in that it

fails to give all parties similarly situated the equal protection of the laws.

2. The term "grantee" being defined in sub. (8), sec. 1596—50, as the grantee of a franchise under said ch. 755, one who maintains and operates a dam under a franchise granted by a prior act of the legislature is not one of the parties, designated in sec. 1596—76, who are given a right to review orders of the commission.

[3. Whether said ch. 755 should be declared unconstitutional because of the heavy penalties provided for, is not determined.]

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Mandamus. By ch. 222 of the Laws of 1883 defendant's predecessors in title obtained the right to build and maintain a dam across Long Lake river just below Long Lake, then in Burnett, now in Washburn, county, with the maximum head of twelve feet. The franchise was granted upon condition "that any of the provisions of this act may be altered, amended or repealed, whenever the legislature may deem it proper to alter, amend or repeal the same." Its present right to maintain the dam is claimed under this act of 1883. On January 30, 1915, the railroad commission of Wisconsin, pursuant to authority granted by ch. 755, Laws 1913, and after a hearing, entered an order providing that the defendant should maintain its dam "between the maximum level of six feet and the minimum level of five feet," with the proviso that, "in cases of flood due to rain or rapidly melting snow, the maximum level may, for a period not to exceed twenty-four hours, be raised three inches."

The defendant failed to comply with the provisions of the order, and in June, 1915, this action of *mandamus* was begun in the circuit court for Dane county to compel obedience thereto. The circuit court held the order valid and entered judgment requiring the defendant to comply with the provisions thereof. From such judgment the defendant appealed.

For the appellant there was a brief by *Charles McPherson* of Grand Rapids, Michigan, attorney, and *George D. Van Dyke* of Milwaukee, of counsel, and oral argument by *Mr. McPherson.*

For the respondent there was a brief by the *Attorney General* and by *E. T. Elver* of Madison, of counsel, and oral argument by *Mr. Elver* and *Mr. E. E. Brossard,* assistant attorney general.

VINJE, J. Ch. 755 of the Laws of 1913 is found as secs. 1596—50 to 1596—79, inclusive, of the Statutes of 1913. The section providing for judicial review reads as follows:

"Section 1596—76. The state, any municipality, or any grantee shall be entitled to review in the circuit court for Dane county any order or finding of the commission made subsequent to the granting of the franchise, and all of the provisions of sections 1797*m*—1 to 1797*m*—109, inclusive, of the statutes, relating to the review of orders or findings made by the commissions, so far as applicable, shall apply to the review herein provided for, including the right of appeal to the supreme court."

The term "grantee" is defined in sub. (8) of sec. 1596—50 as the grantee of a franchise under ch. 755. The defendant, therefore, is not one of the designated parties in sec. 1596—76 given a right to review the orders of the commission, and nothing is contained in secs. 1797*m*—1 to 1797*m*—109, inclusive, giving it such right. So after the order of the commission was made it found itself in this situation: it either had to comply with the provisions of the order, in which case its property was practically confiscated, or it had to run the risk of having the penalties, provided for in sec. 1596—74, of not more than $1,000 for each violation, collected from it. Presumably each act of keeping the level of the water below the minimum or above the maximum would constitute a separate and distinct violation for which the maximum penalty

might be exacted. The defendant claims that a statute which permits the railroad commission of Wisconsin to deal so drastically with its property under such heavy penalty for disobedience, without any right on its part to test the validity of the commission's action by appeal to or review in the courts, is unconstitutional. It is further claimed that under the rule announced in *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885, the act of 1913 should be declared unconstitutional because of the heavy penalties, even if it gave every party a right to his day in court. It is not necessary to pass upon the latter claim in this case because we all agree that the failure of the legislature to give every party adversely affected by an order of the commission his right to test the validity of such order in the courts of the state renders the act void. In *Wadley S. R. Co. v. Georgia,* 235 U. S. 651, 35 Sup. Ct. 214, the court, after reviewing a large number of cases upon this subject, including *Bonnett v. Vallier, supra,* concludes its discussion with this statement of the law applicable to such a situation:

"In the light of this unbroken line of authorities, therefore, a statute like the one here involved (under which penalties of $5,000 a day could be imposed for violating orders of the commission) would be void if access to the courts to test the constitutional validity of the requirement was denied; or, if the right of review actually given was one of which the carrier could not safely avail itself." Page 666.

Here the defendant is not only denied due process of law, but it is denied the equal protection of the laws, inasmuch as the statute gives the right of appeal to certain specified parties and denies it to others without any apparent valid basis for such classification. *Janesville v. Carpenter,* 77 Wis. 288, 46 N. W. 128; *Northwestern Mut. L. Ins. Co. v. State,* 163 Wis. 484, 490, 155 N. W. 609, 158 N. W. 328, and cases cited.

The evidence shows that the defendant's predecessors in

title built the dam for log-driving purposes and that it was so used until about fourteen years ago, since which time it has been used as a reservoir dam for power purposes. It is quite evident that a dam situated as this is, in which a variation of level of only twelve inches is permitted, is practically worthless for power purposes. It is common knowledge that most inland lakes in this state without dams vary more in level than was permitted by the order of the commission. To keep the water during a dry season up to within twelve inches of its level during flood time might be impossible even if the dam were tightly closed, and to keep it only twelve inches higher at flood time than at a time of prolonged drought might be equally impossible even if the dam were entirely removed. This fact is adverted to and is material only because it emphasizes the serious consequences to the defendant resulting from a denial of access to the courts. To comply meant confiscation of his property; to refuse to comply might mean the incurring of penalties equally confiscatory.

The act of 1913 was intended as a complete scheme for the control and supervision of dams, modifying, in so far as it conflicted therewith, franchises previously granted. By reason of its failure to give some of the parties affected by it access to the courts, it must be held to be unconstitutional in that it permits the taking of private property without compensation and without due process of law (*Water Power Cases*, 148 Wis. 124, 148, 134 N. W. 330), and in that it fails to give all parties similarly situated the equal protection of the laws.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment quashing the alternative writ of *mandamus*. No costs to be taxed by either party in either court. The defendant will pay the clerk's fees in this court.

DELBRIDGE and another, Respondents, vs. KAUKAUNA FIBRE COMPANY and others, Respondents, and another, Appellant.

April 6—April 24, 1917.

Receivers: Powers: Contracts extending beyond receivership: Termination by court: Rights of action thereon.

1. The discretion of a receiver in the administration of his trust is so limited that he cannot tie up the trust estate or prevent the court from enforcing an administration thereof in such manner as to protect the best interests of the trust; and all parties dealing with him are charged with knowledge of these limitations on his power and deal with him at their peril.
2. Contracts extending beyond the receivership and intended to be binding upon the trust, if made without express authority from or approval by the court, are within the equitable control of the court and subject to modification or cancellation if the court finds it necessary for the protection of the trust.
3. Where a receiver, who was authorized by the order appointing him to manufacture pulp in a pulp mill and to sell and dispose of the same in the regular course of business until the further order of the court, made a contract to sell and deliver the product of the mill at a certain price up to a date about eleven months thereafter, such contract, though deemed fair and reasonable at its inception, was terminable and was properly canceled by the court at the termination of the receivership, and the other party has no claim for damages on account of such cancellation.
4. An order, in such case, permitting the purchaser to pay at the contract price for the product already delivered, but directing the receiver, in case of default in such payment, to sue for the market price, was erroneous and is modified so as to direct suit, in case of default, for the contract price.

APPEAL from orders of the circuit court for Outagamie county: EDGAR V. WERNER, Circuit Judge. *Modified and affirmed.*

This is an action by the plaintiffs to compel the receiver of the *Kaukauna Fibre Company* to make a sale and transfer of the property of the *Kaukauna Fibre Company* to A. J.

McKay of Appleton, Wisconsin, and to cancel the contract between the receiver and the *Union Bag and Paper Company* for the sale of products of the *Kaukauna Fibre Company.*

The *Union Bag and Paper Company* (hereinafter designated *Bag Company*) filed an intervening petition asking that it be made a party defendant to the cause, that an order be entered ratifying and confirming the contract between the receiver and the *Bag Company,* directing the receiver to carry out the terms of the contract and that any sale of the property and assets in the possession of the receiver be made subject to the rights of the *Bag Company* under the contract, and that the purchaser at such a sale be required to assume the contract.

J. H. Delbridge filed an answer to the intervening petition on behalf of all parties to the cause, including the receiver, and averred that the product had been sold to the *Bag Company* without authority from the court. It charged that the price of the product fixed by the contract was less than the market price and that enforcement of the contract would result in injury to the creditors and stockholders of the *Kaukauna Fibre Company.* It also alleged that the *Kaukauna Fibre Company* had entered into a contract, subsequent to the contract between the receiver and the *Bag Company,* to sell the mill and certain property of the *Kaukauna Fibre Company* to A. J. McKay of Appleton, Wisconsin, and alleged further that if the contract with the *Bag Company* were declared binding on the *Fibre Company* the sale of the property to McKay could not be consummated.

The receiver filed an answer alleging that he entered into the contract with the *Bag Company* for the best interests of the property of the *Fibre Company,* and that no other attorneys were authorized to appear for him in the proceeding than Albert H. Krugmeier and Francis S. Bradford.

Later *J. H. Delbridge* filed a petition alleging that at the time of the appointing of a receiver the *Kaukauna Fibre*

Company was indebted to the amount of $70,170.25. This petition asked that the contract with the *Bag Company* and other contracts be annulled and that the receiver be directed not to make further deliveries thereunder, that the receiver be directed to file his final account, and that he either be discharged and proceedings dismissed or that the court authorize the receiver to make sale of the property to McKay and that the proceeds of the sale be used in payment of the claims against the company.

The receiver answered the *Delbridge* petition, submitting his account, and denied that he had entered into any contracts without authority, and alleged that he had not contracted with nor sanctioned the contract of sale with McKay.

The court held the contract between the receiver and the *Bag Company* void. The order provided that if the *Bag Company* pay the receiver $3,475.32, the amount due for product already delivered, the contract should be affirmed as to all material theretofore delivered, but in default of payment of this sum the court directed the receiver to sue the *Bag Company* for the market price of the product already delivered. The order further denied the motion of the *Bag Company* to be made a party to the action.

The court entered an order declaring the contract made by *J. H. Delbridge* on behalf of the *Kaukauna Fibre Company* with A. J. McKay to be void and canceled all contracts made by the receiver for future deliveries of the mill's products. The court also ordered that the property be sold to J. W. Kieckhoefer upon certain terms and conditions prescribed, the sale to be made free and clear of all liens and claims against the property.

Upon the receiver's report of the sale the court ratified and confirmed the sale of the property to J. W. Kieckhoefer and vested in J. W. Kieckhoefer the right to sue the *Bag Company* for goods sold and delivered under the contract with the receiver.

Subsequent to the above orders the *Bag Company* filed a further petition and contingent claim, alleging that since the property had been sold by the court it had become impossible to carry out the terms of the original contract with the receiver, that the amount of damages it suffered as the result thereof could not be ascertained at the time of the filing of the contingent claim, that a distribution of the proceeds of the sale in the receiver's hands was being contemplated, and asked that it be allowed damages for breach of contract and that pending the ascertainment of damages the receiver be instructed to retain $60,000, and that he be not discharged until the damages could be ascertained and paid.

The court denied this petition, approved generally the acts of the receiver in the operation and management of the *Kaukauna Fibre Company's* property, directed payment of the receiver, his attorneys, and the attorneys for the plaintiff in the original proceeding for their services, and that the receiver pay the creditors the amount of their claims, but provided that the court reserve the right to require each creditor to whom distribution should be made to refund his proportion of any amount necessary to make up a fund sufficient to pay the *Bag Company* its damages in the event any damages should be allowed to it, and retained jurisdiction of the cause for the purpose of enforcing such refund. The *Bag Company* appeals from each of the orders above mentioned.

For the appellant there was a brief by *Ryan, Cary & Frank* of Appleton, attorneys, and *Isham, Lincoln & Beale* of Chicago, of counsel, and oral argument by *Julius P. Frank* and *Paul V. Cary.*

C. G. Cannon of Appleton, for the plaintiff respondents.

James D. Shaw of Milwaukee, counsel for the respondent *Kaukauna Fibre Company.*

SIEBECKER, J. The primary question presented on appeal from the various orders above mentioned is: What

rights has the *Union Bag and Paper Company* under the contract it made with the receiver on February 8, 1916, for the purchase of the hemlock and spruce sulphite to be manufactured at the *Fibre* plant, to be delivered by the receiver to the *Bag Company* from July 1, 1916, to January 1, 1917?

The receiver's power in administering his trust must be found in the order of his appointment, since there is no claim that this contract was specifically authorized or ratified by the court. The order of receivership provides that the receiver shall have full power and authority:

(3) "to operate and run, and to continue to operate and run, *until the further order of this court,* the defendant company's said pulp mill in its usual and regular course of business in the manufacture of pulp and paper stock, and to buy and pay for all necessary materials and equipment therefor . . . ;" and (4) "to finish up any unmanufactured stock, completing it for market, where such course seems best calculated for the best interest of all parties concerned, and to manufacture pulp with said pulp mill and sell and dispose of the same in the regular course of business and to handle and collect the moneys and receipts obtained therefrom in so doing *until the further order of this court.*"

The terms of the provisions of the order authorized the receiver to incur the ordinary obligations incident to the conduct of the business committed to his care. The nature of this receivership conferred certain discretionary powers on the receiver to make contracts if required to promote the business interests in his charge. It is well established that the receiver's discretion in the administration of his trust is so limited that he cannot tie up the trust estate or prevent the court from enforcing an administration thereof in such manner as to protect the best interests of the trust. All parties dealing with a receiver are charged with knowledge of these limitations on the receiver's power and deal with him at their peril. Any person dealing with a receiver who desires to make an irrevocable contract must insist that it be

sanctioned by the court having custody of the property of the trust. The rule governing in such cases is well established and is stated in 34 Cyc. 286, as follows:

"When a receiver is authorized to carry on a business temporarily, his power to incur obligations for supplies, materials, and other expenses in the proper and usual conduct of such business follows as a necessary incident to the receivership. The courts, however, decline to sanction the exercise of this discretion on the part of receivers in respect to large outlays or contracts extending beyond the receivership and intended to be binding upon the trust."

When contracts of this nature are made with a receiver they are held to be within the equitable control of the court, and subject to modification or cancellation if the court finds it necessary for the protection of the interests of the trust. As observed in *Chicago D. V. Co. v. McNulta,* 153 U. S. 554, 14 Sup. Ct. 915:

"The receiver being an officer of the court, and acting under the court's direction and instructions, his powers are derived from and defined by the court under which he acts. He is not such a general agent as to have any implied power, and his authority to make expenditures and incur liabilities—like the one in question—must be either found in the order of his appointment, or be approved by the court, before they acquire validity, and have any binding force upon the trust."

The following cases sustain this practice: *Brown v. Hazelhurst,* 54 Md. 26; *Lehigh C. & N. Co. v. Central R. Co.* 35 N. J. Eq. 426; *Vanderbilt v. Central R. Co.* 43 N. J. Eq. 669, 12 Atl. 188; *Brunner, Mond & Co. v. Central G. Co.* 18 Ind. App. 174, 47 N. E. 686; *In re Punnett C. M. Co.* 24 Misc. 310, 53 N. Y. Supp. 204.

The terms of the order appointing the receiver are not broad enough to permit of the interpretation that the receiver had the power to bind the trust by contract for material to be used in conducting the business beyond the period of

the receivership without the express approval of the court. Since no such approval of the contract with the *Bag Company* by the court was obtained, it necessarily follows that when the property of the trust was sold and the receivership was to be terminated, during the life of the *Bag Company's* contract, it devolved on the court to deal with it upon equitable principles. The trial court considered that the contract, under the circumstances, should be treated as void and to allow the *Bag Company* to pay for the sulphite delivered pursuant to its terms at the stipulated price, and in default of such payment the receiver was directed to sue for the market value of the unpaid portion of the sulphite. It appears that the ruling in effect treats the contract as fair and reasonable at its inception and that it is subject to cancellation when the receivership ended. The contract should therefore be held terminable when the receivership terminated. Under the circumstances equity demands that the *Bag Company's* contract be enforced until it was canceled by the court, and recovery at the contract price be directed for the unpaid portion of the goods delivered under it. Since the contract was properly canceled at the termination of the receivership, it necessarily follows that the *Bag Company* has no claim for damages on account thereof. The order of the court permitting the *Bag Company* to pay the receiver the contract price for the unpaid portion of the sulphite delivered is correct, but the part of the order directing the receiver to sue for the market price thereof in default of payment is erroneous and should be modified by directing the receiver, in case of default of such payment, to sue for such balance at the contract price. All other orders appealed from must be affirmed. The respondents to recover their costs in this court.

By the Court.—It is so ordered.

BORGMAN, Appellant, vs. LANGLADE COUNTY, Respondent.

April 6—April 24, 1917.

Taxation: Valuation of land by board of review: Evidence: Tax sale: Invalidity: Erroneous description: Refund of amount paid: Reassessment: Validity of tax levy: Payment by city of tax on private property: Omission of taxable property: Appeal from county board: Costs.

1. Evidence, including a photographic reproduction of the assessment roll, is *held* to sustain a finding by the trial court that the board of review, after a hearing, had fixed the valuation of plaintiff's land, exclusive of buildings, at $14,870, and not at $12,870 as claimed by him.
2. An erroneous description of land in the assessment and tax rolls and also in the tax certificate issued upon a sale for nonpayment of the tax was a mistake affecting the groundwork of the tax, and the county board was authorized, under sec. 1184, Stats., to refund to the purchaser the amount paid by him at such tax sale, and to reassess the tax under sec. 1186.
3. The fact that the county board in such a case refused to refund until ordered to do so by the circuit court did not affect its authority or duty to do so.
4. Where the taxing officers of a city properly assessed certain property, and a tax was levied against it and the proper officers directed to collect the tax, the fact that the city council adopted a resolution exempting that property and that the city treasurer was directed to and did pay the tax thereon for that year did not invalidate the whole tax levy.

[5. Whether an intentional omission of any piece of taxable property will in all cases render the whole tax levy invalid, is not decided.]

6. An appeal from the refusal of a county board to refund a tax paid under protest being in the nature of an equitable action, costs therein may, under sec. 685 and sub. (7), sec. 2918, Stats., in the discretion of the court be awarded against the plaintiff even though he recovers a small overcharge.

APPEAL from a judgment of the circuit court for Langlade county: EDGAR V. WERNER, Circuit Judge. *Affirmed.*

In 1908 plaintiff was the owner of several lots in the city of Antigo on which there was a bank building and several other buildings. The assessor incorrectly described the

property, and such incorrect description was carried on the tax roll and incorporated in the tax certificate upon the sale of the property for failure of the plaintiff to pay his taxes. Such incorrect description consisted in describing parts of the lots twice; in omitting a part of them, including part of the bank building; and in including a small piece of land owned by another party. The owner of the tax certificate made application to the county board to cancel the same and refund the money. The application was denied and he appealed to the circuit court. It canceled the certificate and directed the county board to refund, which the board did, and at the same time it reassessed the original tax of $886.94 on plaintiff's lots correctly described, with ten per cent. penalty as provided for in sec. 1186, Stats. 1915. The last tax was returned delinquent, but was paid by the plaintiff under protest. He applied to the county board for a refund of the same, and from its denial of his application he appealed to the circuit court. That court held the reassessed tax valid, with the exception of an error in the computation of interest amounting to $4.45, for which sum plaintiff was given credit on the judgment for costs against him. From a judgment dismissing the appeal with costs plaintiff appealed.

For the appellant there was a brief by *Goodrick & Goodrick* of Antigo, and oral argument by *A. B. Goodrick.*

For the respondent there was a brief by *Finucane & Avery,* of counsel, and oral argument by *C. H. Avery* and *C. J. Te Selle,* all of Antigo.

VINJE, J. The evidence shows that the plaintiff appeared before the board of review and that testimony was taken as to the value of plaintiff's land. No question is made but that all parties there present had the correct description of plaintiff's property in mind and that none were in any way misled by the erroneous description on the tax roll. It also

appears that the value of the improvements as shown by the assessment roll was reduced from $28,670 to $17,500, and it is claimed by the defendant and denied by plaintiff that the value of the land was increased from $12,870 to $14,870. The total footing in ink in the proper place is $32,370, which if correct shows the land was valued at $14,870 and not at $12,870. Above the total footing in ink is a pencil footing of $30,370, which the evidence tends to show was made by the city clerk. We are favored with a photographic reproduction of the roll as it left the board of review, and from an inspection of it we cannot say that the trial court erred in reading the second figure of the land value a 4 instead of a 2, especially when taken in connection with the ink footing in the proper place. The result is that plaintiff's property was reassessed upon its proper value and for the true amount, barring the mistake of $4.45 in interest.

Under the rule announced in *Roberts v. Waukesha Co.* 140 Wis. 593, 123 N. W. 135, the error in the description, having ripened into a tax certificate containing the same mistake, was a defect that went to the groundwork of the tax and authorized the county board to refund under the provisions of sec. 1184 as it now stands. The amendment thereto made by ch. 215, Laws 1897, limits refunds to defects going to the groundwork of the tax and changed the rule announced in *Pier v. Oneida Co.* 93 Wis. 463, 67 N. W. 702. The fact that the county board refused to refund until ordered to do so by the circuit court did not affect its authority or duty to do so. The circuit court only directed the county board to do that which the board should have done of its own motion. It follows that the county board properly reassessed plaintiff's property under the provisions of sec. 1186, Stats. 1915.

It is claimed that the tax levy in the city of Antigo for the year 1908 is void because the city council in July, 1908, adopted a resolution exempting the property of the Frost Veneer & Seating Company, a taxpayer of the city, from its

taxes for a period of five years upon certain conditions, and that in February, 1909, it directed the city treasurer to draw an order upon the city treasury for the payment of the Frost Veneer & Seating Company's taxes for 1908, which was done. This action, it is claimed, is equivalent to an intentional omitting of taxable property by the taxing officers and avoids the whole tax levy. We cannot so regard it. The tax officers properly assessed the Frost Veneer & Seating Company's property, and a tax was levied against it and the proper officers directed to collect the tax. The fact that the municipality stepped in and paid the tax cannot affect the validity of the tax proceedings, which were in every respect regular. If the city had no authority to pay the tax any taxpayer thereof could compel its refund to the city treasury and the lands of the Frost Veneer & Seating Company would stand charged with the taxes levied. Nothing herein said is to be deemed to commit the court to the rule that an intentional omission of any piece of taxable property will in all cases render the whole tax levy invalid.

The action before the circuit court being an equitable one, it was within the discretion of the court to award judgment with costs against the plaintiff notwithstanding he recovered the overcharge of $4.45. Sec. 685, Stats. 1915, providing for costs upon appeals from the action of the county board, says that the allowance thereof shall be "subject to the limitations and provisions of these statutes defining liability for costs;" and sub. (7), sec. 2918, Stats. 1915, provides that "in all equitable actions and special proceedings costs may be allowed or not to any party, in whole or in part, in the discretion of the court."

By the Court.—Judgment affirmed.

FLETCHER, Appellant, vs. LA CROSSE COUNTY and others, Respondents.

April 6—April 24, 1917.

Counties: Sale of bonds: Advertisement: Computation of time: Rules of county board: Resolutions: Reference to committee: Definiteness: Place of payment of interest on bonds.

1. Where a resolution of a county board relating to the sale of bonds provided that an advertisement thereof should be published "ten days prior to the sale," the time should be computed as provided in sub. (24), sec. 4971, Stats., by excluding the first day and including the last.
2. *Ward v. Walters*, 63 Wis. 39, so far as it is in conflict with the rule stated in sub. (24), sec. 4971, Stats., overruled.
3. A rule adopted by a county board to the effect that no resolution appropriating money shall be acted upon by the board without first having been referred to and reported back by a proper committee, applies to a resolution offered by a member relating to a matter not referred to and reported upon by a committee, but not to one reported out by a committee to which had been referred the subject matter to which the resolution relates.
4. Where a resolution of a county board authorizing the issuance and sale of bonds provided that the principal of the bonds should be payable at the office of the county treasurer, but did not specify at what place the interest should be paid, the interest is payable where the principal is payable, and the resolution is sufficiently definite in that respect.

APPEAL from an order of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action to restrain defendants from selling bonds for and erecting a tuberculosis sanatorium. Plaintiff is a taxpayer and a resident of the county of *La Crosse*. The county board of supervisors passed a resolution providing for the purchase of a site and the maintenance thereon of a building and equipment for the treatment of persons suffering from tuberculosis, and providing for the issuance of negotiable bonds of the county of *La Crosse* in the sum of $50,000, the resolution relating to bonds containing, among other provisions, the following:

"Resolved further, that said bonds shall be negotiated and sold by the county chairman, the county clerk, and the county treasurer acting together as a committee, and that ten days prior to the sale thereof they shall cause to be published a notice by advertisement in a newspaper published in the county of *La Crosse* stating the terms of the sale and the date thereof."

The resolution provided further for the levying of a tax, and specified the denominations, maturity, etc., of the bonds, none of its provisions other than the quoted one being brought in question. The court denied plaintiff's application for an injunction restraining the sale of the bonds, and from the order denying the injunction plaintiff appeals. Other facts are stated in the opinion.

The cause was submitted for the appellant on the brief of *Morris & Hartwell* and *A. T. Holmes,* all of La Crosse, and for the respondents on that of *Otto M. Schlabach* of La Crosse.

ROSENBERRY, J. The committee caused a notice of the sale of said bonds to be published February 24, 25, and 26, 1917, in which notice the sale was set for 11 o'clock a. m. March 6, 1917. It is claimed that the notice was insufficient because it did not give ten days' notice prior to the time of the sale.

"Section 4273. The time for publication of legal notices shall be computed so as to exclude the first day of publication and include the day on which the act or event, of which notice is given, is to happen or which completes the full period required for publication."

Sub. (24), sec. 4971. "The time within which an act is to be done as provided in any statute, when expressed in days, shall be computed by excluding the first day and including the last, except that if the last day be Sunday it shall be excluded; . . ."

Sec. 1130, Stats., among other things, provided that "the treasurer shall also, at least four weeks previous to said day

[meaning the day of sale], cause to be posted up copies of said statement and notice in at least four public places in such county."

In *Ward v. Walters,* 63 Wis. 39, 22 N. W. 844, the question was whether a notice posted on the 16th of April was posted at least four weeks before the 14th day of May thereafter. It was held that the posting of the notices required by sec. 1130 is not a publication of a legal notice within the meaning of sec. 4273, and that the action was not affected by sec. 34, ch. 140, R. S. 1858 (now sub. (24), sec. 4971, Stats.), which was in force at the time of posting the notices in this case. The court held:

"In the absence of any statutory provision governing the computation of time, the authorities are uniform that where an act is required to be done a certain number of days or weeks before a certain other day upon which another act is to be done, the day upon which the first act is to be done must be excluded from the computation, and the whole number of the days or weeks must intervene before the day fixed for doing the second act." Page 44.

Sec. 30, ch. 144, Laws 1875, being an amendment to the city charter of the city of Milwaukee, provided:

"Every . . . resolution ordering work without a petition therefor shall lie over at least four weeks after its introduction, and no action upon the same shall be taken by the common council if within that time a remonstrance against such proposed improvement shall be presented to the common council," etc.

A resolution was presented at the meeting of the common council of the city of Milwaukee held on the 21st day of January, 1878, and it was adopted by the council at a meeting held on the 18th of February next thereafter. It was claimed that the resolution was not properly adopted because it did not lie over four weeks after its introduction. This court said:

"The resolution was presented to the council when the four weeks expired so that they might act on the same. They evidently construed it, as men ordinarily would, that a week was the period of time extending from Monday of one week to Monday of the next week following, and not until Tuesday of such week, and that the resolution, if introduced on Monday, had laid over four weeks when the fourth Monday thereafter had arrived, and that they were at liberty to act upon it then. This we think is the rational construction of the act, and clearly within the intention of the legislature." *Wright v. Forrestal,* 65 Wis. 341, 27 N. W. 52.

In *Pittelkow v. Milwaukee,* 94 Wis. 651, 69 N. W. 803, the provision of the charter of Milwaukee hereinbefore referred to, providing that no resolution ordering grading, etc., should be voted upon or passed at any meeting of the common council held within four weeks from the time of its presentation to the common council, was again under consideration.

In the *Pittelkow Case* the conflict between *Ward v. Walters* and *Wright v. Forrestal* was recognized and discussed. *Wright v. Forrestal* was adhered to on the principle of *stare decisis,* especially in view of the fact that it had only a local application.

In *Pinkerton v. J. L. Gates L. Co.* 118 Wis. 514, 95 N. W. 1089, and *Chippewa River L. Co. v. J. L. Gates L. Co.* 118 Wis. 345, 94 N. W. 37, 95 N. W. 954, sec. 1130, Stats., was under consideration, and *Ward v. Walters* was approved.

At the present time we have two rules within the state of Wisconsin for the computation of time, which is certainly not a desirable situation. The rule established by sec. 4273 and sub. (24), sec. 4971, states the rule for the computation of time almost uniformly applied in other states. 49 L. R. A. 681; 15 L. R. A. N. S. 686.

In this and similar cases we think the rule stated in sub. (24), sec. 4971, should be applied, the first day excluded and the last day included, and that the publication, therefore,

was sufficient under the terms of the resolution, and *Ward v. Walters, supra,* is overruled so far as it is in conflict with the rule stated in sub. (24), sec. 4971.

At the time the proceedings were had the county board had adopted certain rules, among which were the following:

"No report, resolution, claim, or demand appropriating money shall be acted upon or a vote taken thereon by the board without first having been referred to a proper committee and then reported back by said committee.

"No rule shall be suspended, rescinded, or amended without the concurrence of two thirds of the members present at any meeting. The rules of parliamentary practice shall govern the proceedings of this board in all places where they are applicable."

It is contended that the proceedings were insufficient for the reason that the resolution authorizing the issuance and sale of the bonds, the purchase of the grounds, and other matters, was not referred to any committee as required by the rule above quoted. Pursuant to a resolution adopted in November, a committee of three was appointed to act with a committee on ways and means to investigate the advisability of constructing a sanatorium and to report at the December meeting. The committee was appointed and at the meeting held in December made an exhaustive report which was accompanied by a resolution. Upon motion duly adopted the report and resolution were made a special order of business during the forenoon session of the day on which the report was submitted. At the time specified the report and resolution were considered and adopted by a vote of twenty-five to nine, three members being absent. By the resolution adopted on that day it was provided that, in addition to providing that the county purchase a site and establish a sanatorium, the same committee be authorized and directed to cause plans and specifications for the building to be made and to procure the approval of the state board of control of the site to be

selected by the committee. At an adjourned meeting of the board held on February 8th this committee made a report showing that they had selected a site which had been approved by the state board of control, and reported the progress of the undertaking, together with a resolution to issue and sell bonds to carry into effect the previous determination of the board to erect such sanatorium. The plaintiff in this action, a member of the board, moved to make the report a special order of business for 2 o'clock p. m. of that day, and the report shows that at 2 o'clock, the time specified, under special order of business the report of the committee and the resolution were considered and adopted by a vote of twenty to thirteen, four members being absent, and on the same day the same board adopted a resolution authorizing the chairman to appoint a committee, which was authorized and directed to proceed with the purchase of a site and to provide for the supervision and erection of the building and authorize the drawing of orders on the treasurer.

We think in this case the subject matter of the resolution had been referred to and reported upon by a committee within the meaning of the quoted rule. When the whole subject was referred to a special committee and that committee made a detailed report and reported out a resolution, a reasonable construction of the rule did not require that the resolution be again referred to a committee, even though the resolution be offered by the chairman. We think the resolution referred to in the rule is a resolution introduced by a member, relating to a matter not referred to and reported upon by a committee, and not one reported out by a committee to which has been referred the subject matter to which the resolution relates.

The resolution authorizing the issuance and sale of the bonds did not provide specifically at what place the interest should be paid. It provided that the principal of the bonds

should be payable at the office of the county treasurer, and that the bonds should "be in and of the form hereunto attached." No form is shown in the record.

In the absence of a provision specifying that interest shall be payable at some other place, interest is payable where the principal is payable, and the resolution was therefore sufficiently definite in that respect.

By the Court.—Order affirmed.

KERWIN, J., dissents.

WELDON, Plaintiff in error, vs. THE STATE, Defendant in error.

April 7—April 24, 1917.

Criminal law: Fraudulently taking female from home for unlawful purpose.

Evidence *held* sufficient to sustain a verdict finding defendants guilty of having fraudulently, deceitfully, and by false representations taken a female from her home for the purpose of unlawful sexual intercourse, contrary to sec. 4581c, Stats.

ERROR to review a judgment of the circuit court for Rusk county: JAMES WICKHAM, Circuit Judge. *Affirmed.*

The plaintiff in error, hereinafter called the defendant, and T. F. Malecki were informed against, the information being in six counts. The first count charged the defendants with unlawfully enticing one Leona Christianson from her home for the purposes of prostitution and of having unlawful sexual intercourse, contrary to sec. 4387*a*, Stats. The second count charged the defendants with unlawfully and feloniously having enticed, etc., one Emma Leighty from her home for the purposes of prostitution and of having unlawful sexual intercourse, contrary to sec. 4581*c*. The third count

charged Malecki with having unlawfully assisted, advised, and encouraged the defendant *Weldon* in fraudulently enticing, etc., Emma Leighty for the purposes of prostitution and of having unlawful sexual intercourse with her. The fourth count charged the defendant *Weldon* with aiding and assisting the defendant Malecki in enticing Emma Leighty from her home for the said unlawful purpose. The fifth count charged the defendant Malecki with giving intoxicating liquor to Emma Leighty, contrary to sec. 1557, and the sixth count charged the defendant *Weldon* with giving intoxicating liquor to Leona Christianson, contrary to sec. 1557.

Upon the trial the jury found the defendant Malecki guilty of having given intoxicating liquor to Emma Leighty and the defendant *Weldon* guilty of having given intoxicating liquor to Leona Christianson, and found both defendants guilty of having fraudulently, deceitfully, and by means of false representations taken Emma Leighty from her home for the purposes specified in the second count, and acquitted them as to the other counts. Motions in arrest of judgment and for a new trial were made and overruled and the defendants were fined upon the fifth and sixth counts, and sentenced, upon the verdict finding them guilty as charged in the second count, to one year in the state prison at Waupun. Execution was stayed pending the determination of the matter on writ of error brought by the defendant *Weldon.*

For the plaintiff in error there was a brief by *McGill & Williams* of Ladysmith, and oral argument by *L. E. McGill.*

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

ROSENBERRY, J. The only question raised by the defendant is as to the sufficiency of the evidence to sustain the verdict of the jury as to the second count. There is abundant evidence to establish the allegation that defendants took the

complainant Emma Leighty from her home for the purposes of prostitution and of having unlawful sexual intercourse with her; that their evil intentions were frustrated was due to her determination and great powers of physical resistance and to no lack of purpose and effort on their part. The particular in which the evidence is said to be insufficient is that there is no evidence of enticement or inducement by means of fraudulent, deceitful, and false representations. From the testimony of the girls the jury had a right to believe, and their verdict shows that they did believe, that the two defendants, having an automobile, procured a quantity of liquor, went to the home of Emma Leighty for the purpose of inducing her to take an automobile ride, promised her that they would return her to her home by 11 o'clock or ten minutes prior thereto; that they then took her on a trip lasting from 8 o'clock in the evening, the time of leaving, until about 5 o'clock the next day; that they gave or offered to her liquor which they had in the car, procured other liquor, and endeavored by every means within their power, excepting the use of overpowering force, to compel her to satisfy their unlawful desires. The evidence is sufficient to sustain the finding of the jury that they had this unlawful purpose in mind at the time they went to her home to invite her to take the automobile ride with them, and that they did not disclose to her their true purpose at the time of extending the invitation. We shall not attempt a detailed statement of the evidence. Suffice it to say, we are satisfied that it sustains the verdict of the jury and that the trial court committed no error in refusing to set aside the verdict.

By the Court.—Judgment affirmed.

WILL OF WEYMOUTH: WEYMOUTH, Appellant, vs. WEYMOUTH and others, Respondents.

January 19—May 15, 1917.

Wills: Construction: Gift "to my wife," when person intended is not wife: "So long as she shall remain single:" Nature of estate devised: Limitation.

1. A gift by will "to my wife," where there is no doubt as to the person intended, is a good gift even though such person was not the wife of the testator.
2. A will, dictated and executed by testator during his last illness, provided that all of his property should "go to my wife E. W. so long as she shall remain single. In case of her marriage she shall have the homestead . . . , and one third of all other property . . ." E. W. was not the testator's wife, but had lived with him and been recognized as such for about nineteen years. She had previously been married to one G., who was still living, and they had never been divorced. Testator knew of that marriage and that G. might be living, but believed him to be dead. *Held*, that E. W. was testator's wife, within the terms of the will,—his intention, and what he meant by the phrase "so long as she shall remain single," being that all the property should go to E. W. so long as she should maintain, after his death, the status which she occupied at the time the will was made, *i. e.* so long as she did not again marry or return to G. as his wife.
3. Under such will E. W. took, not merely a life estate, but absolute title to all the property, subject only to the limitation stated.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Reversed.*

This is a proceeding to construe the following will:

"Superior, Wis., March 6th, 1914.

"I, Daniel A. Weymouth, do hereby make my last will and testament:

"That it is my wish that all of my property go to my wife *Elizabeth Weymouth* so long as she shall remain single.

"In case of her marriage she shall have the homestead known as Nos. 1703-1705 58th St., Superior, Wis., and one third of all other property after all debts and accounts are paid, and the balance to go to my brothers and sisters.

"L. A. Potter, DANIEL A. WEYMOUTH.

"Herman Woll,

"Witnesses."

The county court found that Daniel A. Weymouth died testate March 9, 1914, a resident of the city of Superior, Wisconsin, and at the time of his death was the owner of real and personal property valued at $18,000; that he left surviving him *Elizabeth Weymouth,* the proponent, who claims to be his widow, *Charles B. Weymouth* and *Fred B. Weymouth,* brothers, *Kitty Howe,* a sister, and Newton or Nunez Weymouth, who died September 25, 1914, leaving him surviving his widow and two minor children; that the proponent, *Elizabeth Weymouth,* was married to one Joseph Gilling (or Gelling) in Michigan December 12, 1886, at which time she was about eighteen years of age and said Joseph was twenty-two; that said parties were never divorced, as deceased knew; that said Joseph was alive on the 27th of March, 1915, and was then a resident of Illinois and has never married again and is still the lawful husband of proponent, if alive; that from the date of marriage proponent lived and cohabited with Gilling as his lawful wife in Michigan until on or about 1892, during which time she bore three children, and on or about the year last mentioned proponent left said Joseph Gilling and children and resided elsewhere, and as to the birth and existence of said children deceased was well informed at the time he and proponent commenced living together; that on or about the year 1895 proponent took up her residence in the city of Superior, Wisconsin, with the deceased, Daniel A. Weymouth, at which time nor since was any marriage ceremony performed, although proponent and said deceased lived together and represented to their friends and acquaintances that they were married, and were recognized and treated in the community in which they lived as husband and wife to the time of the death of deceased, March 9, 1914. It also appears, pursuant to stipulation, that during the time last above mentioned and in said city and vicinity the proponent, *Elizabeth Weymouth,* was known by the name of *Bessie Weymouth,* and that *Elizabeth Weymouth,* who claims to be the

widow of deceased, and *Bessie Weymouth,* who from time to time signed deeds with him, are one and the same person.

The court concluded that the testator, in willing his property to said *Elizabeth Weymouth* "so long as she shall remain single," intended she should have it regardless of whether or not her husband, Joseph Gilling, was living or dead; it was to be hers so long as she should remain single, or until her remarriage to some one other than Gilling, in which case she was to have the homestead and one third of all other property after all debts were paid; and the court ordered and adjudged that "under said will said proponent, *Elizabeth Weymouth,* takes a life estate in all the testator's property, which estate is, however, subject to be determined by her remarriage, in which case the homestead and one third of all other property of deceased, after all debts and accounts are paid, remainder to be equally divided among his brothers and sisters."

The case was appealed to the circuit court for Douglas county and a change of venue by stipulation taken to Eau Claire county. The circuit court confirmed the findings of the county court and found in addition thereto that "at the time of the execution of said will the deceased, Daniel A. Weymouth, believed that said Joseph Gilling was dead;" and concluded that proponent took nothing under the first clause of the will, but took the homestead and one third of all other property after payment of debts for her sole use and benefit forever.

Judgment was ordered reversing the judgment of the county court appealed from and adjudging and determining the rights of the parties and remitting the case to the county court for further proceedings. Judgment was entered accordingly, from which this appeal was taken.

D. E. Roberts of Superior, for the appellant.

For the respondents there was a brief by *J. B. Weymouth*

of Yale, Michigan, and *Grace, Hudnall & Fridley* of Superior, and oral argument by *George B. Hudnall.*

The following opinion was filed February 13, 1917:

KERWIN, J. The controversy here is upon the construction of the will of Daniel A. Weymouth. There is practically no dispute upon the facts. The question arising upon construction of the will is one of intention of the testator.

It is established that the proponent was married to Gilling and had not been divorced; that the testator, Daniel A. Weymouth, believed that Gilling was dead. But it also seems quite clear from the evidence and findings that he did not know that he was dead and must have realized that he might be living at the time of the execution of the will.

It is also established that deceased and proponent were not married, but lived together as husband and wife for about nineteen years, deceased holding out proponent as his wife during all of this time and the community believing that she was his lawful wife. The testator was informed during his last illness that he was liable to die suddenly and dictated his will in contemplation of death. The will was made by a layman and not artistically worded.

The cardinal principle to be observed in the construction of wills is the intention of the testator. *Donges's Estate,* 103 Wis. 497, 79 N. W. 786; *Pabst v. Goodrich,* 133 Wis. 43, 113 N. W. 398; *Will of Bouck,* 133 Wis. 161, 111 N. W. 573, 113 N. W. 452; *Albiston's Estate,* 117 Wis. 272, 94 N. W. 169; *Moran's Will,* 118 Wis. 177, 96 N. W. 367; *Will of Waterbury,* 163 Wis. 510, 158 N. W. 340.

There are many circumstances in the record tending to show that the deceased intended to give his property to proponent if she did not again marry or return to Gilling as his wife, and this is what he meant by the phrase "so long as she shall remain single." The will on its face, in connection with the facts and surrounding circumstances appearing in

the record, is quite persuasive that the property was not devised to proponent if she were single, but so long as she should maintain the status which she occupied at the time of making the will; and the words of the will, "so long as she shall remain single," had reference to her status at the time the will was made, whether Gilling was dead or not. Her status as his wife was in the mind of the testator when he made the will. He knew proponent was not his lawful wife and also knew that her lawful husband might be living, although he believed him to be dead. The devise was not on condition that Gilling were dead, but was to proponent "so long as she shall remain single." Obviously the intention of deceased was that proponent should have all of his property if she continued to maintain the status which it was understood she occupied at the time the will was made.

It is doubtless true that if the testator intended by the will that proponent should not take if she were not a single woman, then she could not take if Gilling were living (*Stark v. Conde,* 100 Wis. 633, 76 N. W. 600), but we do not think such was the intention of the testator under all the circumstances of the case. The record shows that the testator and proponent lived happily together as husband and wife and the testator accumulated quite a substantial estate, doubtless with the assistance of proponent. She was to him a good helpmate and companion, performed all the duties of a faithful wife, although she was not a lawful wife. It is quite clear from the record that he desired to give her his property so long as she should maintain after his death the status which she occupied during his life. The record shows that he desired that she should not remarry or return to Gilling. Proponent testified: "I don't suppose he wanted me to go back to Gelling after living here so long. If he [Gelling] ever showed up and tried to get me to go back, Dan [testator] would have resisted it. He did not want me to go back to Gelling after his death."

A gift "to my wife," where there is no doubt as to the person intended, is a good gift even though the devisee is not the wife of devisor. Testator had no other "wife;" proponent was his wife within the terms of the will. *Gelston v. Shields,* 78 N. Y. 275, 280; *Pastene v. Boni,* 166 Mass. 85, 44 N. E. 246; *Elliott v. Elliott,* 117 Ind. 380, 20 N. E. 264. Designation "wife" identifies the person, but is not a condition to take. *Jones's Estate,* 211 Pa. St. 364, 60 Atl. 915.

We are convinced that the gift was not on condition that proponent was the lawful wife of testator. It was to the woman whom he lived with as his wife for nineteen years and whom he held out and represented as his wife and whom the public understood to be his wife. The gift was an absolute gift to her provided she entered into no other matrimonial relations or returned to Gilling as his wife. *Dicke v. Wagner,* 95 Wis. 260, 70 N. W. 159; *Pastene v. Boni, supra; Gelston v. Shields, supra; Jones's Estate, supra.*

It is contended, however, by counsel for respondents that in any event the proponent took only a life estate. We cannot agree with counsel in this contention. The will by its terms gave absolute title to the property subject to the limitation specified therein. The language of the gift, if the testator so intended, is sufficient to transfer absolute title to the property, real and personal, to the proponent, subject to be defeated by breach of the limitation in the will. Sec. 2278, Stats.; *Estate of Pierce,* 56 Wis. 560, 14 N. W. 588; *Dew v. Kuehn,* 64 Wis. 293, 25 N. W. 212; *Little v. Giles,* 25 Neb. 313, 327, 41 N. W. 186; *Roberts v. Lewis,* 153 U. S. 367, 14 Sup. Ct. 495; *Weir v. Michigan S. Co.* 44 Mich. 506, 7 N. W. 78; *Davis v. Ripley,* 194 Ill. 399, 62 N. E. 852; *Crain v. Wright,* 114 N. Y. 307, 21 N. E. 401.

We think it clear under the foregoing authorities and others which might be cited that the proponent took an absolute estate forever in the property devised subject to be defeated by the limitation imposed.

In the instant case there is nothing in the will tending to show that an estate less than an absolute title was intended, but on the contrary the will on its face, together with the facts and circumstances, evinces an intention on the part of the testator to give the property absolutely to proponent subject to the limitation. *Verrinder v. Winter,* 98 Wis. 287, 73 N. W. 1007; *Dew v. Kuehn,* 64 Wis. 293, 25 N. W. 212; *Summit v. Yount,* 109 Ind. 506, 9 N. E. 582; *Beatty v. Irwin,* 35 Ind. App. 238, 73 N. E. 926; *Bennett v. Packer,* 70 Conn. 357, 39 Atl. 739; *Becker v. Becker,* 206 Ill. 53, 69 N. E. 49.

In connection with the foregoing cases it should be observed that in the first clause of the will in the instant case the intention of the testator is plain that the proponent was to take all the property of the testator absolutely, subject to the limitation, "That it is my wish that all of my property go to my wife *Elizabeth Weymouth* so long as she shall remain single."

It follows that the proponent is entitled to the property, real and personal, of the testator, Daniel A. Weymouth, absolutely and forever, subject to the limitation named in the will as hereinbefore defined; and in case the said proponent shall marry again or return to said Gilling and live with him as his wife, then and in such event the proponent shall have the homestead and one third of all other property absolutely and forever after all debts and accounts are paid.

By the Court.—The judgment of the court below is reversed, and the case remanded with instructions to render judgment in accordance with this opinion and remit the record to the county court for further proceedings according to law.

VINJE, J., took no part.

A motion for a rehearing was denied, with $25 costs, on May 15, 1917.

MAXWELL, Respondent, vs. JOHNSON and others, Receivers, Appellants.

February 15—May 15, 1917.

Limitation of actions: Notice of injury: Sufficiency: Action against wrong corporation: Receivers: Misdescription: Street and interurban railways: Injury to passenger in alighting: Evidence: Appeal: Harmless error: Equal division of justices.

1. The C. & M. E. *Railway* Co. operates wholly within the city of Milwaukee, while the C. & M. E. *Railroad* Co. (in the hands of receivers) operates interurban cars but runs them in Milwaukee over the tracks of the *Railway* Co. Plaintiff was injured while alighting in Milwaukee from a car of the *Railroad* Co. Action was commenced against the *Railway* Co. Within two years after the accident an amended summons and complaint were served on a ticket agent who represented both the *Railway* Co. and the receivers of the *Railroad* Co. The papers were entitled as in an action against the *Railway* Co. and certain persons as receivers of the *Railway* Co.—such persons being however, in fact, the receivers of the *Railroad* Co. The allegations of the amended complaint were such that it could have no application to any corporation other than the *Railroad* Co. and its receivers; and the receivers were in no way misled by the misdescription. *Held*, that such complaint was a sufficient notice of the injury, under sec. 4222, Stats., to the receivers of the *Railroad* Co.
2. In an action for injuries sustained by a passenger in alighting from an interurban car, it was error to exclude court records offered in evidence to show, as bearing on plaintiff's credibility, that she had pleaded guilty to a charge of drunkenness and disorderly conduct; but the trial court having reduced the jury's award of damages from $3,250 to $1,250, the justices of this court participating in the decision are equally divided on the question whether such error was prejudicial.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action for personal injuries. The complaint alleged that on or about September 25, 1912, plaintiff was a passenger upon one of the cars of the defendant company between the city of Kenosha and the city of Milwaukee; that upon reaching Washington street in the city of Milwaukee plaintiff notified the conductor of said car that she desired to alight

and thereupon the conductor stopped the car as requested; that while plaintiff was in the act of leaving the car the motorman caused the car to start forward suddenly and violently and without notice or warning to the plaintiff, and that by reason thereof she was thrown to the ground and injured. The answer was an admission of the formal allegations of the complaint, and as to the other allegations a general denial.

The case was tried by a jury which rendered the following special verdict: (1) Plaintiff did not step from the car before it came to a stop. (2) The motorman did bring the car to a stop and then start it. (3) The motorman was not in the exercise of ordinary care when he started the car. (4) Failure of the motorman to exercise ordinary care was the proximate cause of plaintiff's injury. (5) Plaintiff was not guilty of any want of ordinary care. (6) Three thousand two hundred fifty dollars will reasonably compensate plaintiff for the injuries she sustained.

The trial court was of the opinion that the verdict of the jury evinced passion and prejudice, the jury in a former trial having assessed the damages at $700; but in view of the fact that there had been two trials the court concluded to reduce the damages to $1,250, and plaintiff had judgment accordingly. Other facts are stated in the opinion. From the judgment defendants appeal.

For the appellants there was a brief by *Edgar L. Wood* of Milwaukee, attorney, and *Bull & Johnson* of Chicago, of counsel, and oral argument by *Mr. Wood.*

For the respondent there was a brief by *A. J. Hedding* and *Rubin, Fawcett & Dutcher,* attorneys, and *Paul R. Newcomb,* of counsel, all of Milwaukee, and oral argument by *Mr. Newcomb.*

The following opinion was filed March 13, 1917:

ROSENBERRY, J. It is contended that the judgment is erroneous because no notice of injury was served by the plaintiff upon defendants, and that the action as against the

defendants, the receivers of the Chicago & Milwaukee Electric Railroad Company, was not begun within two years from the happening of the accident as required by sec. 4222, Stats. It appears that there are two corporations, the Chicago & Milwaukee Electric Railway Company, operating wholly within the city of Milwaukee, and the Chicago & Milwaukee Electric Railroad Company, of which Messrs. *Johnson, Osborne, Hanna,* and *Moore* are receivers, which operates cars between Kenosha and Milwaukee, and under an operating contract with the Chicago & Milwaukee Electric Railway Company operates such interurban cars over the tracks of the railway company in the city of Milwaukee. The action was begun by service of a summons upon the Chicago & Milwaukee Electric Railway Company. The complaint was served on November 18, 1913. On April 8, 1914, plaintiff caused an amended summons and complaint to be served upon J. Johnson, who was the ticket agent representing the Chicago & Milwaukee Electric Railway Company and the receivers of the Railroad Company. The title was as follows: Sarah Maxwell v. Chicago & Milwaukee Electric Railway Company, W. O. Johnson, W. Irving Osborne, D. B. Hanna, and George G. Moore, as Receivers of the Chicago & Milwaukee Electric Railway Company. Neither the receivers nor the Chicago & Milwaukee Electric Railroad Company made any appearance or in any way answered the amended summons and complaint, and in this state of the record the case was brought to trial. During the course of the trial, it being apparent that the Chicago & Milwaukee Electric Railway Company had no interest in the litigation, the case as to it was dismissed. At the close of the trial, there being a verdict in favor of the plaintiff, the trial court directed judgment notwithstanding the verdict unless plaintiff should within twenty days after service of a copy of the order elect to amend the summons and complaint and return of service as to the persons named in the amended summons and complaint and return therein as receivers of the Chicago & Milwaukee Electric

Railway Company so as to describe such persons as receivers of the Chicago & Milwaukee Electric Railroad Company, and further ordered that, if the plaintiff shall elect to so amend the process, pleadings, and return of service, the defendant shall have twenty days after service of such amendment in which to answer such amended complaint. The order was dated April 3, 1915, and on the 29th day of May, 1915, a second amended summons and complaint were served upon the Chicago & Milwaukee Electric Railway Company and upon *W. O. Johnson, W. Irving Osborne, D. B. Hanna,* and *George G. Moore* as receivers of the Chicago & Milwaukee Electric Railroad Company. The receivers appeared and answered and alleged that no notice whatever was served by or on behalf of the plaintiff upon the defendants *Johnson, Osborne, Hanna,* and *Moore,* or either of them, as receivers, within two years from the 25th day of September, 1912, being the day of the accident.

Claim is made that the defendant Railroad Company appeared upon the first trial and participated in the trial, and that by reason of such appearance it waived any defect in the summons and complaint and the return of service. We do not think it necessary to determine that question. It clearly appears that on April 8, 1914, and within two years from the happening of the accident, the first amended summons and complaint were served upon one J. Johnson, who as a ticket agent representing the receivers was a proper person upon whom to make such service. It is true that *W. O. Johnson* and his codefendants were described as receivers of the Chicago & Milwaukee Electric Railway Company. However, the allegations of the amended complaint were such that it could have no application to any other corporation than the Chicago & Milwaukee Electric Railroad Company and its receivers. The Chicago & Milwaukee Electric Railway Company was not in the hands of receivers, nor were *Johnson* and his codefendants receivers of any other company operating cars than the Chicago & Milwaukee Electric Railroad Com-

pany. Whether or not the amended complaint was sufficient to bring *Johnson* and his codefendants in as receivers of the Railroad Company, it was certainly a sufficient notice of injury under sec. 4222, Stats. It conclusively appears that *Johnson* and his codefendants were in no manner whatever misled by the misdescription whereby the company of which they were receivers was described as the railway company instead of the railroad company. We must hold, therefore, that there was a sufficient notice and that the defendant *Johnson* and his codefendants were properly in court.

It is next contended that the verdict is against the overwhelming weight of the evidence. In view of the fact that two juries have believed the testimony of the plaintiff, we cannot say that it is unbelievable.

During the course of the trial the defendants offered the evidence of certain police officers of the city of Milwaukee in reference to the conduct and habits of the plaintiff as bearing upon her credibility, a proper foundation therefor having been laid. In this connection the defendants offered to show by the records of the municipal court of Milwaukee county that plaintiff had pleaded guilty to the charge of drunkenness and disorderly conduct. The court admitted the testimony of the police officers but excluded the plea. We are agreed that the exclusion of this evidence was clearly error. However, the court having rendered judgment upon the verdict only on condition that the plaintiff should remit $2,000 therefrom, thereby reducing it from $3,250 to $1,250, the justices participating are evenly divided on the question of whether or not the error was prejudicial. Under these circumstances, the other questions having been determined adversely to defendants' contentions, the judgment must be affirmed.

By the Court.—Judgment affirmed.

ESCHWEILER, J., took no part.

The appellants moved for a rehearing.

In support of the motion there were briefs by *Edgar L. Wood* of Milwaukee, attorney for the appellants, and *Bull & Johnson* and *A. L. Gardner* of Chicago, of counsel.

For the respondent, in opposition to the motion, there was a brief by *A. J. Hedding* and *Rubin, Fawcett & Dutcher,* attorneys, and *Paul R. Newcomb,* of counsel, all of Milwaukee.

The motion was denied, with $25 costs, on May 15, 1917.

OCONTO ELECTRIC COMPANY, Appellant, vs. PEOPLES LAND & MANUF'G COMPANY and another, Respondents.
SAME, Respondent, vs. SAME, Appellants.
STATE EX REL. PAMPERIN, Appellant, vs. OCONTO ELECTRIC COMPANY, Respondent.

February 16—May 15, 1917.

Public utilities: "Grant" of franchise: Grantee's lack of corporate power: Indeterminate permit: Quo warranto: Annulment of franchise, when may be refused although mayor was interested therein: Rights resulting from dealings and contracts with city: Exchange for indeterminate permit: Suspension or abandonment of franchise: Certificate of convenience and necessity: Street and commercial lighting: Municipal corporations: Validity of contracts: Letting to lowest bidder: Street lighting is not "work:" Change of rate by railroad commission: City council: Meetings: Fraud in awarding contract.

1. Where, pursuant to a city ordinance purporting to grant a franchise to do commercial and municipal lighting, a corporation was doing a commercial lighting business in 1907, when the Public Utility Law (secs. 1797*m*—1 to 1797*m*—108, Stats.) took effect, it was a "public utility" and that law conferred upon it the power to do such business, although its articles of incorporation did not expressly authorize it to do so; and having continued to do such lighting it acquired an indeterminate permit therefor by virtue of ch. 596, Laws 1911 (sec. 1797*m*—77, Stats.).
2. The word "granted" in ch. 596, Laws 1911, was not used in a technical or limited sense, but covered grants legally inopera-

tive for want of corporate power of the grantee; and where, pursuant to the ordinance above mentioned, the grantee of said franchise began to do municipal lighting in 1909, two years after the Utility Law took effect, its franchise to do such lighting became an indeterminate permit under said act of 1911.

3. Even if the mayor had a pecuniary interest in a franchise granted by a city to a lighting company, the courts may properly refuse to annul such franchise in a *quo warranto* action prosecuted, not in the public right—two successive attorneys general having declined to move in the matter—or to protect the public interest, but for the personal advantage of a private relator and in the interest of a competitor seeking to acquire the business of the grantee of the franchise, especially where the facts were known to the relator and said competitor for seven years before the action was begun, during which time they lay by and permitted said grantee to build up its plant and business.
4. By the acts of the city, covering a number of years before and after the Public Utility Act took effect, in dealing with and making contracts for municipal lighting with the grantee of the franchise last above mentioned, said grantee acquired rights in the nature of a "license, permit or franchise," which in 1909 were exchangeable for an indeterminate permit under the Utility Law, although at that time said grantee was doing only commercial lighting, the contract for municipal lighting having been awarded to another company.
5. The suspension contemplated by sec. 1797*m*—74*n*, Stats. (Laws 1913, ch. 621),—providing that no public utility engaged in furnishing heat, light, etc., shall, without first obtaining a certificate of convenience and necessity, exercise any right under any franchise the exercise of which "has been suspended for more than one year,"—is a voluntary suspension of more than one year after the passage of the act. It does not cover a suspension for a year of the exercise of a franchise to do street lighting, due to the fact that the contract for such lighting was awarded to a competing company,—such a suspension being excusable, temporary, and involving no purpose to abandon.
[6. Whether the right to do street lighting and that to do private lighting should be considered as separate and distinct franchises, so that, under said sec. 1797*m*—74*n*, after the suspension of either, a certificate of convenience and necessity must be obtained before that kind of lighting could be resumed, is not determined.]
7. Abandonment means an intentional, voluntary surrender.
8. Although a lighting company which had been doing the street lighting in a city did not submit a bid for such lighting at the

expiration of its contract and, when such lighting was awarded for five years to a competing company, sold to the latter such of its equipment for street lighting as it could not use in its commercial business, this did not constitute an abandonment of its right or franchise to do street lighting, where the reason for its not submitting such bid was that it understood that it was precluded therefrom by the fact that the competing company had secured the exclusive privilege of using in that city the only lamp which would meet the requirements of the proposed contract.

9. The lighting of streets by electricity is not "work" within the meaning of a provision in a city charter that "all work for the city . . . including all printing . . . shall be let by contract to the lowest responsible bidder."

10. Every contract for such lighting is subject to having the rate thereof raised or lowered by the railroad commission, under the Public Utility Law.

11. At a regular meeting of a city council on February 3d, bids from the P. Co. and the O. Co. for street lighting were received and referred to a committee, and the letting of the contract was laid over until the regular meeting of the council in May. The meeting was adjourned "subject to the call of the mayor." Thereafter the mayor issued a call stating that the council would "meet in February adjourned meeting . . . February 25, . . . for the purpose of finishing business, etc." At that meeting the action of the council putting over the letting of the lighting contract was rescinded, and the contract was awarded to the P. Co. at a price lower than either of the bids submitted on February 3d. *Held*, that the meeting of February 25th was a legal meeting and that the proper steps were taken by the council to award the contract.

12. It appearing, however, that the mayor was the attorney of the P. Co. and that the meeting of February 25th was held to prevent the letting of the contract at the May meeting by the new council to be elected in April, to prevent the acceptance of the bid of the O. Co., and to make with the P. Co. a contract (which that company had prepared before the meeting) at a rate much lower than its previous bid and slightly lower than the bid of the O. Co.; and the P. Co. having, a few days later and before furnishing a bond to secure performance of such contract, applied to the railroad commission to increase the rate for street lighting for its benefit, it is *held* that the whole transaction shows a scheme of the P. Co. to secure the lighting contract at a price higher than that specified therein and higher than the price bid by the O. Co., and that therefore the contract so made

was void in its inception and not binding on the city, which was free in May of that year to make a contract (as it did) with the O. Co.

13. When a valid contract for street lighting made by a city with a public utility therein is duly filed with the railroad commission the rate agreed upon therein becomes presumptively reasonable and enforceable until a different rate is established in place thereof by the commission pursuant to law.

APPEALS from judgments of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *One judgment affirmed; the other reversed in part.*

The first above entitled action of the *State ex rel. Pamperin* against the *Oconto Electric Company* is *quo warranto* to oust the electric company from the exercise of any franchise as a public utility in the city of *Oconto.* Reference to this action will hereinafter be made as "the *quo warranto* action." The second above entitled action was instituted pursuant to a stipulation of the parties at the suggestion of the railroad commission of the state of Wisconsin for the purpose of determining the validity of two street-lighting contracts, the legal status of the two companies as public utilities in the city of *Oconto,* and which, if either of the two companies, has the right to do the street lighting of the city for the period of five years from August 7, 1914. Reference to this action will hereinafter be made as "the equity action." We will speak of the *Oconto Electric Company* as the *"Oconto Company"* and of the *Peoples Land & Manufacturing Company* as the *"Peoples Company."* The two actions were tried together and the trial court considered them together and determined the questions involved in both actions in one decision. The facts involved in the two actions are necessarily numerous and in many respects sharp conflicts exist in the evidence supporting the ultimate conclusions of fact as found by the trial court. We shall adopt the trial court's statement of facts of the case as the ultimate facts shown by the evidence and on which the rights of the parties rest:

"The two companies are both and for many years have been doing business as public-service lighting corporations in the city of *Oconto*. Only one at a time has ever done, or from the nature of the situation ever can do, the street lighting. The competition between them has been extremely bitter and strong animosity exists between T. A. Pamperin and W. A. Holt, who are and at all times have been the ruling minds of the companies. Mr. Pamperin is manager of the *Peoples Company* and Mr. Holt is the principal owner of the Holt Lumber Company, which supplies and always has supplied current to the *Oconto Company,* and which has supplied funds to it as needed. The lumber company utilizes the sawdust and shavings from its mills as fuel to produce the current furnished to the *Oconto Company,* which would be practically worthless if not so used. Mr. Holt is a brother of the principal owner of the *Oconto Company,* who is a nonresident of the state, and looks after the interests of his brother. Both companies are Wisconsin corporations. There is nothing in the articles of incorporation of the *Peoples Company* expressly purporting to authorize it to do electric lighting, its purposes being expressed as 'dealing in real estate, manufacturing electrical goods, and doing a general business.'

"Mr. Pamperin in 1890 took charge of the only electric lighting plant then in *Oconto*. He ran this plant in one capacity or another until it was purchased by the *Peoples Company* at sheriff's sale in 1897. This plant did both the commercial and municipal lighting until it was burned in 1899, and during that year its contract for street lighting expired. In October, 1899, the city entered into a contract for street lighting with W. A. Holt, and in January, 1903, another contract for street lighting was let to him. During this time the *Peoples Company* did all the commercial lighting in the city.

"In April, 1904, Holt was elected mayor. Shortly prior to his election he assigned his contract for street lighting to W. H. Young, an employee of the Holt Lumber Company, without consideration of value. The Holt Lumber Company had been furnishing the electricity for the city lighting and continued to do so. During this time that Holt and Young held the contract, the monthly payments from the city were turned directly over to the Holt Lumber Company. It is

obvious that during this time the interests of Holt and Young in the contract with the city were merely nominal, and that the lumber company was the real party in interest under the contract.

"During 1904 an ordinance was passed by the city granting to the *Peoples Company* a franchise to do both street and municipal lighting. In December, 1905, just prior to the expiration of the Holt or Young contract, the city advertised for bids for street lighting and both Young and the *Peoples Company* submitted bids. These bids were rejected, and in February following readvertisement was had and bids were submitted by the *Peoples Company* and the *Oconto Company,* which had been organized in the meantime, the incorporators being three employees of the Holt Lumber Company. The Holt Lumber Company, in February, 1906, sold its street-lighting plant to the *Oconto Company,* and at the same time entered into a contract to furnish it power for the generation of its electricity. In July, 1906, Holt being then mayor, an ordinance was passed by the city granting to the *Oconto Company* the privilege to do commercial lighting, and in August, 1906, the city contracted with that company for street lighting for three years. At the expiration of this contract, in 1909, the city advertised for bids. Only the *Peoples Company* submitted a bid, and the *Peoples Company* was awarded a contract and began street lighting under it in August, 1909. At the time the *Oconto Company* sold to the *Peoples Company* all its poles and wires used for street lighting, and disposed of such other street-lighting equipment as it was not able to use in commercial lighting.

"In December, 1909, the *Oconto Company* took out an indeterminate permit under the Public Utilities Law. At this time it was doing only commercial lighting.

"The *Peoples Company* was not doing street lighting and had never done it when the Public Utilities Law was passed. This company did not take out an indeterminate permit under the Utilities Law, but claims that it has such under the automatic action of ch. 596, Laws 1911, which by its terms brought all public-service corporations under the Public Utilities Law and gave them indeterminate franchises in lieu of those previously exercised. . . .

"In January, 1914, the common council advertised for

bids for street lighting for a period of five years from August, 1914. At a regular meeting of the council on February 3, 1914, a bid was received from the *Peoples Company* at $47 per light per year for all-night and $43 for 'moon-light' schedule service, and one from the *Oconto Company* at $30 per light per year which did not designate which schedule of service it would give. The bids were referred to the committee on lights and the council by motion laid over the matter until the regular meeting in May, 1914. This meeting of the council was 'adjourned subject to the call of the mayor.' On February 25th another meeting of the council was had, pursuant to the call of the mayor, in terms as follows: 'The common council will meet in February adjourned meeting, Wednesday evening, February 25, 1914, at 7:30 o'clock, for the purpose of finishing business, etc.' At this meeting a motion was made and carried to rescind the action of the council putting over the letting of the lighting contract, and it was then moved and carried to enter into a contract with the *Peoples Company* for a period of five years from August, 1914, at $28 per light per year for all-night every-night service. Mr. Pamperin had this contract in readiness for signatures, and it was signed the same evening. Mr. O'Kelliher was mayor of the city, was the attorney of the *Peoples Company* and Mr. Pamperin generally, and was the attorney for the relator in the *quo warranto* action which was then pending. The relator in this action is the wife of Mr. Pamperin, and she is the principal stockholder in the *Peoples Company.*

"On March 5th, before its bond to secure the performance of said contract had been furnished, the *Peoples Company* applied to the railroad commission to increase the rate for the street lighting and to fix a rate for commercial lighting. The *Oconto Company* was made a party to this proceeding, and a hearing was finally set for June 12, 1914.

"On May 20, 1914, after the council elected that spring had taken office, a contract with the *Oconto Company* was formally executed for the furnishing of street lights at $30 per light, pursuant to its bid above mentioned. This company had notified the city in April that it would furnish all-night every-night service or service on a moon-light schedule, as the city might elect."

The court determined

(1) That the *Oconto Company* has had a valid "indeterminate permit" as defined in the Public Utility Law of this state for both street and commercial lighting in the city of *Oconto* since December 23, 1909, and that it never abandoned the public service of street lighting nor "suspended" such privilege within the meaning of such Utility Law.

(2) That the *Peoples Company* has had a valid "indeterminate permit" since July 8, 1911, to do street and commercial lighting in *Oconto.*

(3) That the contract between the city and the *Peoples Company,* dated February 25, 1914, is valid, but that the rate for service specified therein is subject to modification by the railroad commission pursuant to law; that the *Peoples Company* is not entitled to specific performance thereof; and that the city is liable in damages resulting from a breach by the city.

(4) That the contract between the city and the *Oconto Company,* dated May 20, 1914, is valid, but the rate for service specified therein is subject to modification by the railroad commission pursuant to law, and that in case of a breach thereof by the city the company is entitled to damages resulting from such breach.

(5) That upon the filing of such contracts with the railroad commission the specified rates became presumptively reasonable and binding on the parties until such commission should fix different rates, which rates would then be obligatory on the parties.

(6) That none of the parties recover costs in the equity action, except that the *Oconto Company* recover $3.82, the one half of its disbursements for state tax, clerk's and sheriff's fees.

The city of *Oconto* as defendant in the equity action has taken no active interest in the controversy, except that it asserts the invalidity of the contract dated February 25, 1914, between it and the *Peoples Company.*

The *Peoples Company* has appealed from the judgment entered in the *quo warranto* action.

All of the parties to the equity action have taken an appeal from parts of the judgment entered therein.

For the *Oconto Electric Company* there were briefs by *Allan V. Classon* of Oconto and *Greene, Fairchild, North, Parker & McGillan* of Green Bay, and oral argument by *Mr. J. R. North* and *Mr. Classon.*

For the *Peoples Land & Manufacturing Company* there were briefs by *John A. Kittell* of Green Bay, attorney, and *Classon & O'Kelliher* of Oconto and *Lynn D. Jaseph* of Green Bay, of counsel, and oral argument by *Mr. Kittell.*

For the *City of Oconto* the cause was submitted on the brief of *John B. Chase* of Oconto.

For the relator, *Pamperin,* there was a brief by *Classon & O'Kelliher* of Oconto and *Kittell & Burke* of Green Bay, and oral argument by *V. J. O'Kelliher* and *John A. Kittell.*

The following opinion was filed March 13, 1917:

SIEBECKER, J. The controversies presented in the two cases have been treated in one proceeding before the trial court and were submitted together on appeal in this court. In the *quo warranto* action relator assails the *Oconto Company's* rights as claimed by it under an indeterminate permit granted pursuant to the Public Utility Law and seeks to have it annulled on the ground that the company at the time of obtaining such permit had no legal license, permit, or franchise from the city to exchange for such indeterminate permit, as called for by the provisions of the Public Utility Law. The action of the *Oconto Company* against the *Peoples Company* and the city of *Oconto* involves the right of both companies to conduct the business of street and commercial lighting in the city of *Oconto* and the validity of the street-lighting contracts of 1914 between the city and the *Peoples Company* dated February 25th, and a second contract between the city and the *Oconto Company* dated May

20th. Upon the facts as above stated the trial court held that the two companies were holding lawful indeterminate permits and that they have been conducting their public businesses in the city of *Oconto* under such permits from times prior to the commencement of these actions and that the contracts above referred to were valid obligations and binding upon all the parties. The court in an elaborate and well considered opinion states the grounds of its decision upon all of the questions determined by the judgment. We shall adopt the views of the trial court as expressed in its opinion on the litigated questions in so far as its conclusions harmonize with the views of this court upon the questions presented here.

On the question of the legal status of the *Peoples Company* the court declared:

"This company was doing commercial lighting in 1907 when the Utility Law went into effect. Under the rule of *Calumet S. Co. v. Chilton,* 148 Wis. 334, 347, 348, 135 N. W. 131, notwithstanding the limitations of its articles of incorporation, it was a public-service utility and a Wisconsin corporation, and the Utility Law conferred upon it the power to exercise the privileges it was at the time in fact exercising. It has continued to do such lighting up to this time, and there is no doubt that it has an indeterminate permit therefor.

"How about its power to do municipal lighting? It did not begin such lighting until two years after the Utility Law went into effect. Such lighting was done by the *Oconto Company* until it was taken up by the *Peoples Company,* but at such time the *Oconto Company* had not yet taken an indeterminate permit, so there was no need for the *Peoples Company* to get a certificate of convenience and necessity under sec. 1797*m*—74 in order to commence such lighting. It now has an indeterminate permit for such lighting under ch. 596, Laws 1911, if a 'license, permit or franchise' therefor was 'granted' prior to the passage of the Utility Law within the meaning of that chapter. It must be conceded, I think, that the ordinance purporting to grant a franchise to the *Peoples Company* was ineffectual as a legal grant because of want of power by the company under its articles of incor-

poration to do a lighting business. But I think that notwithstanding this, the ordinance 'granted' a franchise within the meaning of ch. 596. The word 'granted' was not used in a technical sense or a limited sense, but covered grants legally inoperative for want of corporate power of the grantee, just as the original sec. 1797*m*—77, which ch. 596 amends, covered permits or licenses being exercised under void grants. The assumption of municipal lighting by the *Peoples Company* seems to me referable to the ordinance, and it is therefore a 'grant' within the meaning of said ch. 596. Ch. 217, Laws 1911, validating franchises surrendered for an indeterminate permit notwithstanding any 'defect, irregularity or invalidity' therein, strengthens this view. It was the intention of both sections to validate and confirm and create into indeterminate permits all privileges of whatever sort actually being exercised in 1911 when these laws were passed, regardless of how their exercise began and no matter what they were referable to. As said in the *Calumet Service Company Case* (148 Wis. 367): 'The law must be given a reasonable,—sensible,—construction, at all points, to the end that the legislative intent shall not fail, instead of looking with favor upon technical assaults upon it.' "

On the question of relator's right to have the *Oconto Company's* indeterminate permit annulled the trial court correctly held:

"I am of the opinion that Mr. Holt was 'indirectly interested' in the franchise issued to the *Oconto Company*. . . . But whether the state would . . . move [to oust the company from its franchise] was for the attorney general to determine, and he determined not to bring suit but to leave the prosecution to the relator. Manifestly this suit is prosecuted, not at all in the public right, but for the personal advantage of the relator, or rather that the company in which the relator is a stockholder may acquire the *Oconto Company's* business through the taking away of its franchise. The suit is only another skirmish between the embattled companies, each of which is apparently more bent on the destruction of the other than it is on its own welfare. The *Peoples Company* knew of the facts respecting Mr. Holt's interest at the time the franchise was granted as well and as fully as it

knew them when this suit was started. It alleged the ultimate fact as a ground of relief in the *mandamus* action brought by it in 1906 to compel the letting to it of a lighting contract. That Mr. Pamperin was the instigator of that action, as he now is of this, is manifest. Both actions must be considered as in reality actions of the *Peoples Company*. The petition in that case was verified, so that the evidentiary facts to substantiate the claim of interest were presumably as well known to the company then as they were when this action was commenced. Not only did the *Peoples Company* know the fact, but so did the relator herself. Seven years elapsed between the commencement of the actions. With that knowledge the relator and the *Peoples Company* lay by for that term and saw the *Oconto Company* build up its plant and business, and now, not at all for the purpose of vindicating a public right or protecting the public interest, but for the vindictive and selfish purpose of destroying a competitor and seizing its business, would have the *Oconto Company's* franchise annulled. I cannot believe that the court is compelled to annul the franchise under such circumstances, especially when two successive attorneys general have declined to move in the public right. It may be further stated as additional reason for denying the relief, that the record shows that the *Peoples Company* has resorted to practices as contrary to fair dealing and as subversive of the public good as the conduct of Mr. Holt or the *Oconto Company* in connection with the granting of the franchise."

We will consider hereinafter the rights of the *Oconto Company* arising out of its commercial and street-lighting business up to August, 1909, and its commercial lighting business after the *Peoples Company* had secured the three-year street-lighting contract from the city in August, 1909, respecting the claims that it had abandoned or suspended the street-lighting business within the contemplation of the Utilities Act.

Was the *Oconto Company* at the time it applied for an indeterminate permit in December, 1909, operating a public utility as defined in such act? Notwithstanding the imperfect inception of the rights then being exercised by the com-

pany and which it surrendered in exchange for the indeterminate permit, they were of a nature and substance which constituted a "license, permit or franchise" exchangeable for the indeterminate permit granted by the commission under the Utility Act. As held in *Calumet S. Co. v. Chilton,* 148 Wis. 334, 135 N. W. 131:

"The legislature did not rest the matter, as it might have done, by mere use of the term 'franchise.' The broad term was used instead, 'license, permit or franchise,'—in short, any public privilege of any sort to do any kind of the service mentioned within the scope of the Public Utility Law, followed by the term 'franchise' as a synonym for the entirety."

And so here the *Oconto Company* had acquired rights in the nature of a "license, permit or franchise" by the acts of the city throughout their dealings and contracts from 1899 to the time it applied for the indeterminate permit. The facts of the case sustain the conclusion that the *Oconto Company* had and was operating its public utility under a "license, permit or franchise" of the city, and the surrender thereof entitled it to an indeterminate permit in December, 1909. Since these rights are not necessarily dependent solely on the ordinance of July, 1906, it is not necessary to consider the question whether the provisions of ch. 217, Laws 1911, abrogated whatever rights the *Oconto Company* had under such permit, nor need we consider whether or not the provisions of this chapter were intended to affect permits in existence when it was adopted.

The trial court's conclusion on the question of the *Oconto Company's* power to do street lighting seems to be well sustained upon the grounds set forth in the opinion:

"It is claimed by the *Peoples Company* that it [*Oconto Company*] has no such power because it abandoned the field of street lighting in 1909 and has not entered it since. It is also claimed that it has 'suspended' the privilege of street lighting for more than a year and that under sec. 1797*m*—74*n* it has no power to resume it without a certificate of necessity and convenience.

"As to the latter point, the statute referred to should not be given a retroactive effect. The suspension covered by it should be construed to be a suspension of one year after its passage. The act, ch. 621, Laws 1913, was published July 12, 1913. The *Oconto Company's* bid was submitted on February 3, 1914. Since that time its 'suspension' of street lighting has not been voluntary. And the suspension referred to by the statute must be a voluntary suspension. . . . The statute can hardly have intended to give one of two competing utilities an indeterminate permit for street lighting and to deprive the other of such permit therefor merely because the one gets from the city wherein they are situated a contract for a year's street lighting. . . . A suspension of one year under these circumstances would be an 'excusable, temporary suspension, involving no purpose to abandon.' As further said in the *Calumet Service Co. Case,* p. 367, 'The law must be given a reasonable,—sensible,—construction, at all points, to the end that the legislative intent shall not fail.'

"Either the above must be the correct view or we must, as it seems to me, construe the statute as not intending to differentiate street lighting and private lighting as separate and distinct franchises, but intended to consider them both as within the single franchise of lighting. It is true that the courts have distinguished between the two kinds of lighting, in some respects, but it does not follow that they constitute distinct franchises. It is plain from sec. 1797*m*—74*m* that the Utility Law aims to protect competing companies in their franchises. The statute by its terms applies only to companies the granting of whose franchises were pending at the time a competing company takes out or secures an indeterminate permit. But if the statute intended to protect such franchises, it certainly was contemplated that franchises already existing were protected, either by that section or otherwise.

"Considering the question as one of abandonment, irrespective of mere suspension. Abandonment means an intentional, voluntary surrender. In 1909, when the *Oconto Company's* contract for street lighting was about to expire, the *Peoples Company* desired to enter the field—which it had never theretofore entered notwithstanding its 'grant' in its ordinance. The council advertised for bids which were, or

which the *Oconto Company* thought were, framed with a view to preclude it from complying with them. To satisfy the test incorporated in the advertisement would necessitate the company's discarding its old lights and substituting new ones. There was only one lamp made which could meet the test required by the proposal for bids, and the *Oconto Company* on inquiry was informed and believed that it could not procure these lamps because the *Peoples Company* had secured the exclusive privilege of using them in *Oconto*. Whatever the facts may have been as to the *Oconto Company's* actual ability to procure these lamps, it seems clear that it understood that it could not get them and was thereby precluded from bidding. . . . It in fact submitted no bid, but it did not intend to give up the privilege of street lighting forever or surrender the franchise it then had therefor. The contract was let for five years, and it therefore could not resume street lighting for that period. Its sale, when and shortly after the *Peoples Company* took over the street lighting, of its poles and lights and such other equipment for street lighting as it could not use in its commercial business, does not evidence an intent, either at the time or subsequently, to abandon the street-lighting privilege. Its equipment was liable to go entirely out of use during the term of the contract and the property thus become a total loss by keeping it, and its sale is reasonably referable to a desire to avoid loss."

The controversy concerning the validity of the contracts made by the city with each of the companies dated respectively February 25, 1914, and May 20, 1914, was determined by the judgment.

We consider that the trial court correctly determined that the provisions of the city charter requiring that contracts for "work," "including printing," should be let to the lowest bidder in the manner contemplated by the charter provisions are not applicable to contracts for street lighting. The basis of its decision on this point is stated as follows:

"It has been held quite generally that lighting is not 'work' within similar provisions, for the reason that there is ordinarily but one plant in a city that can furnish such serv-

ice and therefore only one concern that can bid, so that the purpose of the provision, which is to secure competition, necessarily cannot apply. *Oconto* contained no public-service plant for either public or private lighting in 1882, when the charter provision was adopted. At that time, if public lighting by electricity was contemplated in the future at all, it was necessarily contemplated to be furnished under ordinary conditions, and the charter provision cannot therefore have been intended to cover contracts for such lighting. It was not until 1899 that competition in electric lighting was possible. I am of the opinion that public lighting by electricity is not 'work' within the charter provision. There was therefore no necessity to advertise for bids. There being no necessity, the advertising done, like the advertising of private individuals, was nothing but an invitation to submit offers, and, like a private individual, the city was not bound to accept the lowest or any offer made in response. . . .

"But both contracts were made subject to the provisions of the Public Utility Law. The city, as well as private individuals, was subject to that law. The city, no more than a private person, could make a contract that would give to it any special privilege. *Kilbourn City v. Southern Wis. P. Co.* 149 Wis. 168, 135 N. W. 490. This case is to the precise point that a contract by a municipality for free public lighting is void as against the public policy of the Utilities Law, on the ground, primarily, that the law contemplates that municipalities, like individuals, shall pay a reasonable compensation for the services received. . . .

"My view of the matter is that if the contract rate is filed with the rate commission, . . . that rate is presumptively reasonable and therefore valid as long as the commission leaves it in force, and that compensation for service at the contract rate can be collected until the commission, on application or of its own initiative, fixes a different rate upon investigation and hearing. Every such contract is subject to having the rate thereof raised or lowered by the commission. Sec. 1797*m*—32 contemplates changes of rate by a utility without first procuring the approval by the commission. Sec. 1797*m*—33 provides that such a rate 'shall be the lawful rate' until it is changed by the commission. Secs. 1797*m*—49 to 1797*m*—51 empower the commission to fix rates on its own motion."

It is claimed by the *Oconto Company* that the contract made between the city and the *Peoples Company* on February 25, 1914, is invalid. It is averred on this point that the council meeting of February 25, 1914, at which the common council authorized the contract, was not a legal meeting of the common council. This meeting was held upon the written notice set forth in the foregoing statement of facts. The council met pursuant thereto and authorized the making of this contract. We consider that the trial court's holding that the meeting was a legal one and that the proper steps were taken by the common council to order this contract is correct. But we cannot agree with the trial court that the action of the officers and agents of the *Peoples Company* in making this contract shows that they in good faith intended to carry out the agreement and that it is a valid obligation and binding on the city. The facts pertinent to this question are as follows:

"In January, 1914, the common council advertised for bids for street lighting for a period of five years from August, 1914. At a regular meeting of the council on February 3, 1915, a bid was received from the *Peoples Company* at $47 per light per year for all-night and $43 for 'moon-light' schedule service, and one from the *Oconto Company* at $30 per light per year which did not designate which schedule of service it would give. The bids were referred to the committee on lights and the council by motion laid over the matter of letting the contract until the regular meeting in May, 1914. This meeting of the council was 'adjourned subject to the call of the mayor.' On February 25th another meeting of the council was had, pursuant to the call of the mayor, in terms as follows: 'The common council will meet in February adjourned meeting, Wednesday evening, February 25, 1914, at 7:30 o'clock, for the purpose of finishing business, etc.' At this meeting a motion was made and carried to rescind the action of the council putting over the letting of the lighting contract, and it was then moved and carried to enter into a contract with the *Peoples Company* for a period of five years from August, 1914, at $28 per light per year for all-night every-night service. Mr. Pamperin had this contract

in readiness for signatures, and it was signed the same evening. Mr. O'Kelliher was mayor of the city, was the attorney of the *Peoples Company* and Mr. Pamperin generally, and was the attorney for the relator in the *quo warranto* action which was then pending. The relator in this action is the wife of Mr. Pamperin, and she is the principal stockholder in the *Peoples Company.*

"On March 5th, before its bond to secure the performance of said contract had been furnished, the *Peoples Company* applied to the railroad commission to increase the rate for the street lighting and to fix a rate for commercial lighting. The *Oconto Company* was made a party to this proceeding, and a hearing was finally set for June 12, 1914.

"On May 20, 1914, after the council elected that spring had taken office, a contract with the *Oconto Company* was formally executed for the furnishing of street lights at $30 per light, pursuant to its bid above mentioned. This company had notified the city in April that it would furnish all-night every-night service or service on a moon-light schedule, as the city might elect."

It is manifest from the steps taken by the mayor and the common council that the February 25, 1914, meeting was held to prevent letting of the lighting contract at the May meeting by the new council to be elected in April. The proceedings of this meeting and the active part in the transaction by Mr. Pamperin in changing the *Peoples Company's* bid from $47 per light to $28 per light, thereby reducing it below the $30 bid of the *Oconto Company,* and his action in having the contract at the reduced rate prepared before the meeting and having it signed at this meeting, and the acquiescence of the city officials in all these transactions, indicate that the main purpose of the whole transaction was to prevent acceptance of the *Oconto Company's* offer to furnish light at the rate of $30 per light. Coupling these acts with those of the *Peoples Company's* representative on March 5th, before the company furnished a bond to secure performance of this contract, by applying to the railroad commission to increase the rate for street lighting for its benefit under this

contract, it is obvious that this was a scheme to secure the street-lighting contract at a price higher than the price specified in the contract or the price at which the *Oconto Company* offered to furnish light. The whole transaction shows an attempt to make a pretended contract for a rate per light much less than its bid, with the intent to secure a higher rate than the *Oconto Company's* bid through the action of the railroad commission. This wrongful conduct violated the transaction and justified the newly elected common council in treating the contract as void from its inception and enabled it to contract with the *Oconto Company* on the following 20th of May.

The conclusions from the foregoing are that the *Peoples Company* has no valid contract for street lighting with the city and that the city was at liberty to enter into the contract with the *Oconto Company* as it did on May 20, 1914. The facts and circumstances surrounding the making of this contract (Exhibit B) make it valid and obligatory upon the parties thereto. Upon filing it with the railroad commission the rate agreed upon therein became presumptively reasonable and enforceable until a different rate is established in place thereof by the railroad commission pursuant to law.

Upon the foregoing consideration of the cases it necessarily follows that the judgment in the *quo warranto* action must be affirmed, and that the *Peoples Company* take nothing upon its appeal in the equity action; that upon the appeals of the *Oconto Company* and the city of *Oconto* the judgment in the equity action is reversed in so far as it is adjudged that the contract between the city of *Oconto* and the *Peoples Company* dated February 25, 1914, is valid, and in all other respects the judgment is affirmed.

By the Court.—The judgment appealed from in the case of the *State of Wisconsin ex rel. N. E. Pamperin* against the *Oconto Electric Company* is affirmed.

The judgment appealed from in the case of the *Oconto Electric Company* against the *Peoples Land & Manufactur-*

ing Company and the city of *Oconto* is reversed in part and affirmed in part on the appeal of the *Oconto Electric Company,* as indicated in the opinion, and that the defendant *Peoples Land & Manufacturing Company* take nothing on its appeal therefrom. No costs are allowed in the equity case to either party; the *Peoples Land & Manufacturing Company* to pay the clerk's fees in this court in the equity case.

A motion for a rehearing was denied, with $25 costs, on May 15, 1917.

CAPPON, Respondent, vs. O'DAY, Appellant.

April 4—May 15, 1917.

Courts: Adherence to general rules: Appeal: Review: Questions not raised in trial court: Chattel mortgages: Filing: Sufficiency.

1. Where the enforcement of any rule for the administration of the law will result in a failure of justice, it should be carefully scrutinized and not blindly adhered to.
2. The general rule that questions not raised in the trial court will not be reviewed in the supreme court on appeal is subject to many exceptions. This court undoubtedly has the power to review such a question, but whether it should do so or not depends upon the facts and circumstances of the particular case.
3. In an action by the assignee of a chattel mortgage to recover, from one who purchased from the mortgagors, property covered by such mortgage, the question whether there had been such a filing of the mortgage as to make it valid against third persons is determined on appeal though not raised in the trial court—the facts being fully shown by the record and the question having been fully argued.
4. Under secs. 2313, 2314, Stats., a chattel mortgage, to be valid as against third persons, must be filed in the office of the clerk of the town, city, or village in which each of the mortgagors resided at the time of its execution.
5. A chattel mortgage filed in a town to which one of the mortgagors subsequently removes is not properly filed; nor does the removal of the mortgagors to the town in which the mortgage is in fact filed, but improperly so, make the mortgage valid as to third persons.

APPEAL from a judgment of the circuit court for Wood county: BYRON B. PARK, Circuit Judge. *Reversed.*

On December 10, 1913, Anna Kern sold to Silber and Scheer, all of the parties at the time being residents of the city of Milwaukee, a farm in Wood county, together with certain personal property thereon, and to secure the payment of $2,000, which was part of the purchase price of the farm and personal property, she took back a chattel mortgage from the purchasers dated December 10, 1913, upon the personal property. The chattel mortgage recites that the mortgagors, Silber and Scheer, reside in the city of Milwaukee, and that part of the description of the personal property material here is as follows:

"Three (3) horses. . . . Said property is now on the north half of the northeast quarter (N. ½ of the N. E. ¼), section thirty-one (31), township twenty-three (23) north, of range five (5) east, Wood county, Wisconsin. All of the said property being now in the possession of said first party in the county and state as aforesaid, and free from all incumbrance."

It appears that at the time of the execution of the chattel mortgage Silber intended to remove to the farm in Wood county and that he did so remove within two or three days after the mortgage was executed. Scheer and his family continued to reside in the city of Milwaukee until April 22, 1914, when they also moved upon the farm. On January 24, 1914, the chattel mortgage was filed with the town clerk of the town of Sigel, Wood county, the town in which the farm was situated. At the time the chattel mortgage was recorded Silber was residing upon the farm and Scheer in the city of Milwaukee. On March 2, 1914, Anna Kern assigned the mortgage to the plaintiff, *Jesse Cappon.* August 20, 1914, Silber and Scheer sold for value to defendant two of the horses which they purchased from Anna Kern and which were attempted to be described in the chattel mortgage. After making the bargain for the horses but before paying for them,

except a down payment of $10, defendant went to the office of the town clerk of the town of Sigel to inquire as to liens upon the property. The clerk was not at home, and his wife looked at the files but failed to find anything. On his way home the defendant met the clerk and renewed his inquiries and was advised by the clerk that he could not remember, and the clerk promised that he would examine the records and write him; and he did write defendant advising him of the existence of the mortgage. But without waiting to hear from the clerk the defendant paid the balance of the purchase price and took the horses. After receiving the town clerk's letter the defendant went to the mortgagors and secured a guaranty to the effect that the horses were free and clear of liens and that the mortgagors would protect him. September 29, 1914, Silber and Scheer were arrested for selling property covered by chattel mortgage, contrary to the statute. The case was continued, and on October 14, 1914, it was settled in accordance with the statute and dismissed. It appears that by the settlement Silber and Scheer deeded to plaintiff their equity in the real estate, on which they had paid $1,000, turned back all of the personal property remaining on the farm, and in addition paid $100 in cash. Silber and Scheer claim that this was to be a settlement of all claims. Plaintiff claims that it was a settlement of special damages accruing by reason of the sale of the chattel-mortgaged property. In the property turned back was some personal property which Silber and Scheer had acquired after the purchase of the farm and not covered by the chattel mortgage. Shortly after the settlement plaintiff commenced this and two other actions to recover property described in the chattel mortgage.

The court submitted the case to the jury, and the jury found (1) that the description of the horses in the chattel mortgage from Silber and Scheer to Anna Kern was insufficient so as to render the chattel mortgage void as to the defendant; (2) that there was an agreement between Silber

and Scheer and Anna Kern that Silber and Scheer could sell or exchange the horses and stock described in the chattel mortgage, Exhibit A, and replace the same with other horses and stock; and (3) that the value of the horses involved in this action was $325. The parties then made the usual motions. Upon motion of the plaintiff the court changed the answers to questions 1 and 2 from Yes to No, and upon the verdict as so changed directed judgment for the plaintiff in the sum of $325, and further found that plaintiff was entitled to judgment in any event, notwithstanding the verdict, for such sum. Judgment was entered accordingly, and defendant appeals.

For the appellant there were briefs by *W. E. Wheelan* of Grand Rapids, and a separate supplemental brief by *Mr. Wheelan,* as attorney, and *Claire B. Bird* of Wausau, of counsel; and the cause was argued orally by *Mr. Bird.*

For the respondent there were briefs by *Goggins, Brazeau & Goggins* of Grand Rapids, and oral argument by *Hugh W. Goggins* and *T. W. Brazeau.*

ROSENBERRY, J. It is claimed (1) that the description of the property in the chattel mortgage is insufficient to make the mortgage a valid instrument; (2) that the court erred in holding incompetent the evidence of the agreement between the mortgagors and the mortgagee as to the right of the mortgagors to sell and replace the property described in the mortgage; and (3) in refusing to submit to the jury the question whether before this action was commenced plaintiff's claim was discharged and satisfied.

The question as to whether or not the chattel mortgage was filed as required by secs. 2313 and 2314, Stats., so as to be valid as against third parties, was not raised in the court below. It appearing from the undisputed evidence, however, that the mortgagors resided in the city of Milwaukee at the time of the execution of the mortgage and that only one of

the parties resided in the town where the mortgage was recorded at the time it was recorded, this court upon its own motion required briefs to be filed on the following question:

"Was the filing of the chattel mortgage given by Silber and Scheer, mortgagors, dated December 10, 1913, in the town of Sigel, Wood county, Wisconsin, a sufficient filing to make the same valid as against third parties, under secs. 2313 and 2314, Stats.?"

Such supplementary briefs have been filed. No claim is made that the facts are other than as stated, nor is there any claim that the mortgage was ever filed in the city of Milwaukee.

Respondent claims in his supplementary brief that, the question of the validity of the mortgage not having been raised, the record is conclusive upon this court, and for this court to now consider the question would amount to a perpetration of a gross wrong and hardship upon the plaintiff and imposition upon the trial court.

We cannot agree with this contention. This court sits here to do justice between litigants. For the purpose of orderly administration and the attainment of justice certain rules are established. Any rule the enforcement of which results in a failure of justice should be carefully scrutinized and not blindly adhered to, unless the abandonment of it will work more injustice than will follow if it be adhered to. One of the rules of well nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal. 3 Corp. Jur. 689. The reason for the rule is plain. If the question had been raised below, the situation might have been met by the opposite party by way of amendment or of additional proof. In such circumstances, therefore, for the appellate court to take up and decide on an incomplete record questions raised before it for the first time would, in many instances at least, result in great injustice, and for that reason appellate courts ordinarily

decline to review questions raised for the first time in the appellate court. But to this rule there are many exceptions. Questions as to the jurisdiction of the court may be raised. *Telford v. Ashland,* 100 Wis. 238, 75 N. W. 1006. Questions as to the legal effect of a deed or other instrument may be raised for the first time in this court. *Hartung v. Witte,* 59 Wis. 285, 18 N. W. 175; *Nightingale v. Barens,* 47 Wis. 389, 2 N. W. 767. There are numerous other exceptions. 3 Corp. Jur. 740. No question of the power of this court is involved. Whether this court should review a question raised here for the first time depends upon the facts and circumstances disclosed by the particular record. It undoubtedly has the power, but ordinarily will not exercise it. The question is one of administration, not of power. The statements in *Will of Brandon,* 164 Wis. 387, 160 N. W. 177, and *Ritter v. Ritter,* 100 Wis. 468, 76 N. W. 347, to the effect that questions not brought up in the court below cannot be considered here, must be considered as statements of the general rule to which there are exceptions as here indicated.

In this case the question as to the validity of the mortgage has been fully argued. It is not claimed that the facts do not fully appear. The record is complete. If it were not, we should feel it our duty to remand the record and order a new trial in accordance with the provisions of sec. 2405*m,* Stats.

"Section 2313. No mortgage of personal property shall be valid against any other person than the parties thereto unless the possession of the mortgaged property be delivered to and retained by the mortgagee or unless the mortgage or a copy thereof be filed as provided in section 2314, except when otherwise directed in these statutes. . . ."

"Section 2314. Every mortgage of personal property or a copy thereof may be filed in the office of the clerk of the town, city or village where the mortgagor resides, or in case he is a nonresident of the state then in the office of the clerk of the town, city or village where the property mortgaged may be at the time of the execution of such mortgage; . . ."

It is undisputed in this case that the mortgagors at the

time of the execution of the mortgage resided in the city of Milwaukee and that the chattel mortgage was never recorded in the city of Milwaukee. In order to meet the requirements of secs. 2313 and 2314, Stats., so as to make the mortgage valid as against third parties, it must be recorded in the office of the clerk of the town, city, or village where the mortgagors reside at the time of its execution, and if the mortgage is executed by two or more persons residing in different towns, cities, or villages it must be recorded in the office of the clerk of the town, city, or village in which each of the mortgagors resided at the time of the execution of the mortgage. A mortgage recorded in a town to which one of the mortgagors subsequently removes is not properly recorded, and neither does the removal of the mortgagor to the town where the mortgage is in fact recorded, but improperly so, make the mortgage valid as to third persons. That such was the intention of the legislature seems clear from the history of the statute, and the construction that has heretofore been placed upon it by this court points the same way. *First Nat. Bank v. Biederman,* 149 Wis. 8, 134 N. W. 1132; *Bailey v. Costello,* 94 Wis. 87, 68 N. W. 663. Such construction is in accordance with the great weight of authority elsewhere. Jones, Chat. Mortg. (5th ed.) §§ 250, 251*a;* Pingree, Chat. Mortg. § 362; 2 Cobbey, Chat. Mortg. § 573; *In re Nuckols,* 201 Fed. 437; *Burbank v. Robek,* 157 Ky. 524, 163 S. W. 457; *Burlington State Bank v. Marlin Nat. Bank* (Tex.) 166 S. W. 499; *Hales v. Zander,* 24 Okla. 246, 103 Pac. 669; *Lasswell v. Henderson,* 144 Mo. App. 396, 128 S. W. 789; *Fife v. Ohio Inv. Co.* 52 Ind. App. 108, 100 N. E. 392.

Not having been filed in accordance with the terms of the statute, we are clear that the chattel mortgage in question was void as to third parties, and the consideration of other questions becomes immaterial.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

ELAND STATE BANK, Respondent, vs. MASSACHUSETTS BONDING & INSURANCE COMPANY and another, Appellants.

April 6—May 15, 1917.

Principal and surety: Fidelity bond: Larceny or embezzlement by bank cashier: Misappropriations or loans? Knowledge of other officers: Evidence: Weight and sufficiency: Banks and banking: Reports: "Correct, Attest:" Accountability of bank officers.

1. In an action on a fidelity bond insuring the plaintiff bank against loss from any acts of its cashier amounting to larceny or embezzlement, the evidence is *held* to establish that the plaintiff's officers knew all the facts relating to the alleged misappropriations of its funds by the cashier and treated them as loans, and hence that no liability of the surety was shown.
2. The evidence of plaintiff's officers in such case, consisting of general denials of knowledge of material facts which it was their duty as such officers to know, is *held* to have been incredible and without any probative force when taken in connection with the particular facts admitted by them and with undisputed documentary evidence consisting of "call reports," reports of committee to bank and banking commissioner, declarations of directors, account books of the bank, and certificates given by the bank to the bonding company to obtain renewals of the bond.
3. The words "Correct, Attest" followed by the signatures of bank directors, appended to a report transmitted to the commissioner of banking as showing the condition of the bank, mean not only that such directors bear witness but that they affirm the report to be true.
4. Public policy as well as private rights require that officers of banks should be held to strict accountability in the discharge of their official duties.

APPEAL from a judgment of the circuit court for Shawano county: EDGAR V. WERNER, Circuit Judge. *Reversed.*

This action was brought to recover on a bond given March 7, 1911, for one year and renewals of said bond issued in 1912, 1913, and 1914 executed by the defendant company as surety for one *G. J. Moses,* cashier of plaintiff bank.

The complaint claims that *Moses,* while cashier of plaintiff bank, converted money belonging to the bank to his own

use and was guilty of larceny and embezzlement in so doing; that while cashier he permitted one John H. Walechka, a former cashier of plaintiff bank and principal stockholder thereof, to obtain sums of money from the bank, and that these sums taken by Walechka were not loans but constituted larceny or embezzlement.

Defendants denied all liability and alleged that there was no larceny or embezzlement by *Moses* or Walechka or any one else, and that all money received by *Moses* or Walechka was received by them as loans. Several defenses are set up in the answer, some of which will be referred to in the opinion herein.

The case was tried by the court and a jury. After the evidence was all in the court overruled a motion by defendants for a directed verdict. The following general verdict was returned by the jury:

"We, the jury, duly impaneled to try the issues in the above entitled action, find for the plaintiff and assess its damages at the sum of $9,861.34 dollars."

Judgment was entered in favor of the plaintiff upon the verdict, from which this appeal was taken.

For the appellants there was a brief by *M. J. Wallrich* of Shawano and *Brown & Guesmer* of Minneapolis, Minnesota, attorneys for the *Massachusetts Bonding & Insurance Company,* and *A. M. Andrews* of Shawano, attorney for *Moses;* and the cause was argued orally by *Arnold L. Guesmer.*

For the respondent there was a brief by *Dillett & Winter* of Shawano, and oral argument by *C. F. Dillett* and *Paul J. Winter.*

KERWIN, J. Before the execution of the bond upon which this action was brought certain questions were propounded by the defendant company to plaintiff and answers required, some of which are:

"*Q.* What means will you use to ascertain whether his ac-

counts are correct? *A.* Check them." "*Q.* How frequently will they be examined? *A.* At least twice annually by examining committee." "*Q.* When were his accounts last examined? *A.* At the meeting of the examining committee in January, on the 14th, 1911." "*Q.* To whom and how frequently will he account for his handling of funds and securities? *A.* To examining committee, who meet twice annually. To state examiners. To me, I shall be here often."

It further appears that the bond in suit, executed March 7, 1911, was for a valuable consideration renewed thereafter in 1912 on delivery of the following certificate made by plaintiff:

"This is to certify, that on the 15th day of January, 1912, the books and accounts of *Mr. G. J. Moses* in our employ at Eland, Wis., were examined by us and we found them to be correct in every respect, and all moneys handled by him accounted for. He has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guarantee bond should not be continued."

Renewals of the bond were thereafter made in February, 1913 and 1914, on a similar certificate.

The bond in suit covered cases only where *Moses* took money in such way as to amount to larceny or embezzlement. In order, therefore, to make out a case the plaintiff was obliged to prove that *Moses* misappropriated the money of the bank in such way as to amount to larceny or embezzlement.

We are convinced, after a careful examination of all the evidence, that there is no competent credible evidence to support the verdict or to establish any liability against the defendant company. On the contrary, we think the evidence establishes that the moneys misappropriated by *Moses* were treated by the plaintiff as loans.

The evidence is overwhelming and without substantial dispute that the plaintiff, through its officers, knew all the facts relating to the alleged misappropriation of the funds of the bank and treated the funds unlawfully received as loans by the bank. The proof is conclusive that the officers of the

plaintiff bank knew, or should have known, and cannot be heard to say that they did not know, of the falsity of the representations made by them to the defendant company.

The evidence of defendant is largely documentary and its oral testimony is specific on the particular material facts at issue, while the evidence of plaintiff on the vital questions consists in general denials of knowledge of material facts which it was the duty of the witnesses to know, and which from the admitted facts they ought to have known and should not be heard to say they did not know.

The competent documentary evidence alone in the case, consisting of "Call Reports," reports of committee to bank and banking commissioner, declarations of directors of plaintiff, account books of plaintiff bank, and certificates for renewals of bond from the bank to the surety, conclusively shows that no case was made by the plaintiff.

As before observed, the evidence of the plaintiff's witnesses consists of broad, sweeping denials of knowledge, and when taken in connection with the particular facts admitted by such witnesses and the undisputed evidence on the part of the defendant it is rendered incredible and without any probative force. While the officers of the bank make general, sweeping denials of knowledge of the affairs of the bank, they show by the admission in their testimony of specific facts that they had knowledge. The evidence shows clearly and without substantial dispute that the officers knew of the *Moses* and Walechka loans and that the money appropriated by them and for which this action was brought was at all times treated as loans. To discuss the evidence in detail would extend this opinion to an unreasonable length and serve no useful purpose.

The "Call Reports" made by authority of law and transmitted to the commissioner of banking were sworn to by the cashier, with "Correct, Attest" by two directors of the plaintiff. These reports show the condition of the bank and the

transactions regarding the *Moses* and Walechka items. But the directors claim they did not know the contents of these reports, yet they do not testify that they did not read them.

The cashier swears that the statement in the report is correct and that the schedules annexed fully and correctly represent the true state of the several matters therein contained. The directors who "Attest," however, claim they only signed as witnesses and did not know the contents. The words "Correct, Attest" are written just below the signature of the cashier who verified the document and just above the signatures of the directors. The words "Correct, Attest" mean not alone to bear witness, but to affirm to be true or genuine. The words are appropriately used for the affirmation of persons in their official capacity to attest the truth of a writing. *McGuire v. Church,* 49 Conn. 248.

The directors made declarations in writing to the bank examiner as to the condition of the plaintiff bank and declared, among other things, that all notes and securities were good and collectible, except as therein specified, and no exception was made as to the matters involved in this suit. The directors, who signed these declarations, testified that they did not know of the *Moses* and Walechka items at the time of signing. The *Moses* and Walechka notes, however, appeared on the bank records at the time the directors so signed and the bank examiner took them into consideration in checking the balances. It is therefore apparent that the directors must have found them and known of their existence at the time of making the declarations.

The directors further endeavored to excuse themselves on the ground that they were not familiar with the account books of the bank, but their oral testimony shows that they were sufficiently familiar with such books to inform themselves concerning the items in question. They also seek to avoid the consequences of their acts in making the false certificate by which they obtained renewals of the bond upon which suit

is brought on the ground of want of knowledge. But it seems upon the whole evidence of the directors who signed these certificates that they did know of the *Moses* and Walechka items at the time of signing. Moreover, they were bound to know that these certificates were true before they signed and delivered them, on the faith of which they obtained renewals of the bond.

It is idle for the officers of plaintiff to say, in face of all the evidence orally given as well as documentary, that they were without knowledge of the material facts in the case respecting the dealings of *Moses* and Walechka with plaintiff.

The whole situation was plain; they had but to open their eyes and see. It was their duty to know, and they cannot now, in the face of the record, say they did not know. *Standard Mfg. Co. v. Slot,* 121 Wis. 14, 98 N. W. 923; *Kaiser v. Nummerdor,* 120 Wis. 234, 97 N. W. 932; *Keller v. Schmidt,* 104 Wis. 596, 80 N. W. 935; *Zunker v. Kuehn,* 113 Wis. 421, 88 N. W. 605; *Mannel v. Shafer,* 135 Wis. 241, 115 N. W. 801; *Krause v. Busacker,* 105 Wis. 350, 81 N. W. 406; *First Nat. Bank v. Hackett,* 159 Wis. 113, 149 N. W. 703. Public policy as well as private rights require that officers of banks should be held to a strict accountability in the discharge of their official duties.

Some authorities are cited by counsel for plaintiff, but in our view of the case they do not reach the questions involved in the instant case. They are clearly distinguishable and we shall take no time discussing them. We hold that no case of larceny or embezzlement was shown and therefore no case was made by the plaintiff.

Other defenses need not be treated.

By the Court.—The judgment is reversed, and the action remanded with instructions to dismiss the complaint on the merits, with costs.

JOHNSTAD, Appellant, vs. LAKE SUPERIOR TERMINAL & TRANSFER RAILWAY COMPANY and another, Respondents.

April 24—May 15, 1917.

Workmen's compensation: Holding case open for contingencies: Final hearing: Award: Judicial review: Injury not impairing wage-earning capacity.

1. An order of the industrial commission finding that an injured employee had not suffered any impairment of his earning capacity after a certain date and that full compensation had been paid up to that date, but stating that, because he might suffer loss of earnings in the future on account of his disability, the case would be "left open for the statutory period until such contingency may arise," was a definite decision that up to the time of the hearing there was no ground for the allowance of further compensation; and it is *held* that there had been a final hearing and that the order or award was one which might be reviewed under sub. 1, sec. 2394—19, Stats.
2. There is no authority, in such a case, for holding the matter open or adjourning for any time other than for a reasonable time as provided in sec. 2394—16, Stats.
3. Physical injury not diminishing wage-earning capacity did not entitle an injured employee to compensation under the Workmen's Compensation Act as it existed in 1913.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from a judgment of the circuit court confirming the order of the *Industrial Commission* dismissing the application of plaintiff and denying compensation.

The plaintiff, a married man thirty-seven years of age, worked for the defendant railway company as boiler-maker helper and blacksmith at $2.40 per day. He was injured by a piece of steel penetrating his right arm, and was totally disabled from the time of the injury, September 30, 1914, to January 2, 1915, when he returned to work for the defendant helping take stock and assisting on books and doing other work. When applicant returned to work his wrist was some-

what stiff, but much of the stiffness had disappeared at the time of hearing. He was left, however, with a permanent partial disability; he has stiffness of the wrist to the extent of fifty per cent. loss of motion thereof, but can use his hand for many kinds of work. He afterwards engaged in the lumber business with a partner. From the date of injury to January 1, 1915, appellant was paid compensation as for total disability and his expenses for medical attendance.

The *Commission* denied compensation. The circuit court confirmed the findings and decision of the *Industrial Commission* and allowed no compensation.

For the appellant the cause was submitted on the brief of *W. P. Crawford* of Superior.

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman*, assistant attorney general, which brief was joined in by *J. A. Murphy* of Superior, attorney for the respondent *Railway Company;* and the cause was argued orally by *Mr. Gilman* and *Mr. Murphy.*

KERWIN, J. 1. A preliminary question is raised by respondents as to whether the order or award can be reviewed upon this appeal. It is claimed that no review can be had because there was no final hearing, and sub. 1, sec. 2394—19, Stats., is relied upon. We think the contention of counsel for respondents cannot be sustained. It is true that under the order and findings of fact the *Commission* found that had the accident occurred subsequent to July 10, 1915, it would be adjusted on a relative injury basis, the same basis upon which the *Commission* had adjusted accidents of this kind prior to July 10, 1915, and until the Northwestern Fuel Company decision [*Northwestern Fuel Co. v. Industrial Comm.* 161 Wis. 450, 152 N. W. 856] had been rendered. The *Commission* further found that it could not find as a fact that the appellant in the instant case had suffered any

impairment in his earning capacity in a suitable employment subsequent to January 2, 1915, therefore held that the case could not be closed because the appellant might suffer loss of earnings in the future on account of his disability, and that the case would therefore be left open for the statutory period until such contingency might arise. The *Commission,* however, held definitely that up to the time of the trial there was no ground for the allowance of any compensation other than what had been paid, for the reason that after January 1, 1915, up to the time of award there had been no loss of earning capacity. That was the issue presented and tried before the *Commission,* and we are of opinion that on the case tried and determined there was a final hearing and award, therefore there was an order or award to be reviewed.

2. We are also of opinion that the order or award must be affirmed, for the reason that the evidence sustains the findings that at the time of the determination of the matter before the *Commission* the appellant was not entitled to compensation. It appears that on January 2, 1915, appellant returned to work at the same wages he had been receiving before the injury, though in a different line of work, but a suitable employment, and that he continued in such employment until February 20, 1915, at which time he left of his own accord the employment of the *Lake Superior Terminal & Transfer Railway Company* and entered into the retail lumber business with a partner, and that he was earning the same wages as when working full time for the railway company. The evidence fully establishes that after January 2, 1915, there was no loss of earning capacity. This was the test of the right to compensation in the instant case, and, it not having been established that there was a loss of earning capacity, the *Commission* was right in the award. There was no actual loss of any member and the injury occurred prior to the 1915 amendment of the law, therefore there could be no compensation allowed by the *Commission* under

the relative injury clause and no compensation or allowance under the law as it then existed. Physical injury not diminishing wage-earning capacity did not entitle one to compensation under the law as it existed in 1913. *Northwestern F. Co. v. Industrial Comm.* 161 Wis. 450, 152 N. W. 856.

Sub. (2) (b), sec. 2394—9, Stats., provides, "If the accident causes partial disability, sixty-five per cent. of the weekly loss in wages during the period of such partial disability." Sub. 2, sec. 2394—10, Stats., at the time of the injury provided:

"The weekly loss in wages referred to in section 2394—9 shall consist of such percentage of the average weekly earnings of the injured employee, computed according to the provisions of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, and other suitable employments, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury."

The *Commission* found: "We cannot find as a fact that the applicant in this case has suffered any impairment in his earning capacity in a suitable employment, subsequent to January 2, 1915." This finding is well supported by the evidence. We must therefore hold that the award of the *Industrial Commission* was right, and the judgment of the court below affirming the same cannot be disturbed. *International H. Co. v. Industrial Comm.* 157 Wis. 167, 147 N. W. 53; *Northwestern F. Co. v. Industrial Comm., supra; Mellen L. Co. v. Industrial Comm.* 154 Wis. 114, 142 N. W. 187; *Weber v. American S. S. Co.* 38 R. I. 309, 95 Atl. 603.

We also find that there is no authority for holding the case open further than for a reasonable time provided by statute, sec. 2394—16, and there is no authority for adjourning for any time other than as provided by statute, and the order and award herein are final.

By the Court.—The judgment appealed from is affirmed; the *Lake Superior Terminal & Transfer Railway Company* to recover costs on this appeal against the appellant.

NEFF, Appellant, vs. BARBER, Special Administrator, and others, Respondents, and another, Appellant.

April 24—May 15, 1917.

Conspiracy to wreck corporation: Evidence: Sufficiency: Right to jury trial in equitable action: Costs: Discretion: Printing supplemental case on appeal.

1. In an action by a stockholder and creditor of a gas company in behalf of the company to recover damages on the ground that certain named defendants, as officers of the company, having fraudulently conspired to wreck the company, so mismanaged it that it went into the hands of a receiver and was sold to said defendants at foreclosure sale at much less than its real value, findings of the trial court to the effect that there was no conspiracy and no mismanagement and that the property was sold at its fair value at the foreclosure sale, are *held* to have sufficient support in the evidence.
2. Although the issue as to a conspiracy was one at law, plaintiff was not entitled to a jury trial thereof as a matter of right, the action being an equitable one.
3. The right to trial by jury does not extend to equitable actions; and all issues therein, whether legal or equitable, are triable by the court.
4. Allowance by the trial court of full costs to the defendants in this case was not an abuse of discretion.
5. Upon affirmance of a judgment no costs are allowed to respondents for the printing of a supplemental case consisting almost entirely of exhibits properly referred to in appellants' case.

APPEAL from a judgment of the circuit court for Langlade county: A. H. REID, Judge. *Affirmed.*

Action in equity brought by plaintiff as a stockholder and creditor of the defendant the *Antigo Gas Company,* in its be-

half. The complaint charges in substance that certain named defendants as officers of the *Antigo Gas Company* fraudulently conspired to wreck the company in order that they might acquire the franchise and property thereof at a price much less than its real value; that in pursuance of such conspiracy they so mismanaged the company that it was compelled to borrow large sums of money; that they blocked an advantageous sale of the plant to another company; that it defaulted in the payment of interest on its bonds; that upon a foreclosure of the trust deed securing the bonds it went into the hands of a receiver, who was one of the defendants charged with the conspiracy, and that he mismanaged it while receiver, and that its property was sold to said named defendants at foreclosure sale at much less than its real value. Judgment in favor of the *Antigo Gas Company* for the benefit of its stockholders and creditors situated similarly to the plaintiff is demanded in the sum of $50,000.

The court, against plaintiff's objection, tried the case without a jury and found that there was no conspiracy and no mismanagement; that the *Antigo Gas Company* was never sufficiently financed; that it was compelled to carry on expensive litigation, owing partly to factional fights from within and partly to large damage suits brought against it by outsiders; that neither the company nor its stockholders or creditors ever sustained any loss on account of any wrongful acts on the part of the defendants charged with the conspiracy or mismanagement, or of any of them. On the contrary, it found that said named defendants managed the company for its best interests; that at times some of them came to its aid with their own individual money; and that they paid the fair value of the company's property at the foreclosure sale. From a judgment dismissing the complaint upon the merits, with costs, the plaintiff and the defendant *Antigo Gas Company* appealed.

For the appellants there was a brief by *Kittell & Burke* of

Green Bay and *McMahon & McMahon* of Milwaukee, attorneys, and *P. H. Martin* of Green Bay, of counsel, and oral argument by *Omar T. McMahon* and *Stephen J. McMahon.*

For the respondents *Barber,* as special administrator of the estate of R. H. Hackett, deceased, *Wallen, Richard Koebke,* and *Mary Koebke,* as administratrix of the estate of J. C. Spencer, deceased, there was a brief by *Goodrick & Goodrick* of Antigo, and oral argument by *A. B. Goodrick.*

For the respondents *Maxcy, Schriber,* and *City Gas Company* there was a brief by *Thompson, Thompson, Allen & Gruenewald* of Oshkosh, attorneys, and *Kreutzer, Bird, Okoneski & Puchner* of Wausau, of counsel, and oral argument by *J. C. Thompson* and *C. B. Bird.*

VINJE, J. The most important questions arising upon the appeal in this case are questions of fact resolved by the trial court in favor of the respondents. The evidence touching them is voluminous and the briefs of counsel as well as the oral arguments cover every phase of the transactions called in question. We have carefully considered both the evidence and the arguments and conclude therefrom that the trial court correctly found the facts. It seems to have been a case where a gas company, starting in a relatively small city, came to financial grief through lack of the required experience in the stockholders and managers of the corporation, through inadequate financial resources, through heavy damage cases brought against it, and above all through irreconcilable dissensions and lawsuits from within. To set forth and discuss the transactions in question would require a score or more pages and would be of no service to the legal profession. For this reason, only an outline of the nature of the action is contained in the statement of facts, and no amplifications thereof will be made in the opinion.

Turning to the legal questions we find but two that were argued. It is claimed, first, that since the issue of a con-

spiracy is one at law plaintiff was entitled to a jury trial thereof as a matter of right, even if he was in a court of equity. He admits that the action was one in equity, but claims, nevertheless, the absolute right to a jury trial of the issue of law presented by the charge of conspiracy. That the right to a trial by jury does not extend to equitable actions is too well settled in our jurisprudence to be now successfully questioned. *Harrigan v. Gilchrist,* 121 Wis. 127, 281, 282, 99 N. W. 909. In an action in equity all the issues, whether legal or equitable, are triable by the court. In its discretion an advisory verdict upon any or all of the issues may be taken, but neither party is entitled thereto as a matter of right, much less to a verdict having the force of one in an action at law.

We perceive no abuse of discretion in the trial court allowing respondents full costs. Upon this appeal, however, no costs will be allowed them for printing the supplemental case. It consists almost entirely of exhibits properly referred to in appellants' case.

By the Court.—Judgment affirmed.

ROSENBERRY, J., took no part.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant, vs. HOLMES, Respondent.

April 24—May 15, 1917.

Guaranty: Note secured by chattel mortgage: Subsequent agreement between mortgagor and mortgagee: Power of sale: Application of payments.

1. The rights of a guarantor of one of several notes secured by a chattel mortgage could not be impaired or diminished by any contract made between the mortgagor and the mortgagee subsequent to the making of the guaranty.
2. A chattel mortgage gave the mortgagee power, in case of a default in payment of any of the notes secured thereby, to declare the whole debt due and to take and sell the property. Without

attempting to proceed under such power, the mortgagee, after two of the four notes secured had become due, procured from the mortgagor an agreement authorizing him to sell the property and apply the proceeds upon any of the notes without affecting liability on the others. *Held*, that as against a guarantor of one of the notes already due such agreement was of no effect, and that the proceeds of a sale thereunder must be applied upon the notes in the order of their maturity.

3. When a debtor makes a payment without application the creditor cannot apply the amount of the payment to a debt not due, to the exclusion of one due or overdue.

APPEAL from a judgment of the circuit court for Polk county: W. B. QUINLAN, Judge. *Affirmed.*

Action against guarantor on promissory note. The plaintiff on August 28, 1912, sold to one Sidney Samples a traction engine and a set of gang plows for $1,900. To secure payment of the purchase price plaintiff took from Samples a chattel mortgage upon the engine and plows to secure four notes for $475 each, all dated August 28, 1912, due, respectively, on the 1st day of December, 1912, 1913, 1914, and 1915. The sale was made through the defendant as agent of the plaintiff, and on August 28, 1912, the defendant, by writing indorsed upon the back of the second note, guaranteed the payment thereof, but he did not indorse or guarantee the other notes. Samples took possession of the property, plowed about seventy acres of land, and then came to the conclusion that he would be unable to pay for the outfit, and some time in the fall asked the defendant to resell it. Pursuant to that request the defendant endeavored to sell the engine to one Daniel H. Gray, and at the request of the defendant the plaintiff's salesman, a Mr. Gill, procured from Gray a conditional contract for the purchase and sale of the engine. Thereafter Gray canceled the contract, as he might do, and purchased another engine from the plaintiff. Defendant claims that he had an agreement with Mr. Scott, one of plaintiff's agents, to the effect that if defendant should sell the machine for $1,150 he should be released from liability

on his guaranty. After the attempted sale to Gray the plaintiff company repaired the engine and procured from Samples a bill of sale of the property which authorized the plaintiff to sell the property at public or private sale and provided that the proceeds of the sale should be applied as a credit on the indebtedness owing from Samples to the plaintiff, described the notes, and contained this further agreement:

"It is further specially agreed by and between the parties that the delivery of said personal property to and the sale of the same by second party [plaintiff] shall in no manner relieve or release first party [Samples] from liability for payment of any of his said indebtedness upon said notes that may remain unpaid after the net proceeds of the sale of said personal property has been credited as aforesaid; and it is further agreed that the net proceeds realized from the sale of said personal property may be applied by second party on either or all of said notes as said second party may elect, and the application of any money thus received will be considered as a voluntary payment of said first party on said note or notes as of the date on which the said personal property is sold."

The engine was sold for $900 and the gang plow for $250. Thereafter plaintiff brought suit against defendant on his guaranty of the second note. The jury found that the reasonable market value of the traction engine and plow bottoms in May, 1913, was $1,450. It appeared without dispute that Samples had paid upon the first note $250. Judgment was entered for the defendant dismissing plaintiff's complaint, from which judgment plaintiff appeals.

For the appellant the cause was submitted on a brief signed by *C. C. & A. E. Coe* of Barron.

For the respondent there was a brief by *Kennedy & Yates* of Amery, and oral argument by *W. T. Kennedy.*

ROSENBERRY, J. It is contended that the judgment should be affirmed (1) because defendant was released on account of

the sale to Gray; (2) that the property was sold contrary to sec. 2316*a*, Stats., relating to the sale of personal property taken by virtue of a chattel mortgage; and (3) that defendant was released by the provisions of sub. (3) and (4*a*) of sec. 1679—1, Stats.

"(3) By the discharge of a prior party;"

"(4*a*) By giving up or applying to other purposes collateral security applicable to the debt, or, there being in the holder's hands or within his control the means of complete or partial satisfaction, the same are applied to other purposes."

The first and second contentions may be dismissed without further consideration than to say that sale in fact was not made to Gray and therefore the contract was not complied with, and (2) that no property was taken under the terms of the chattel mortgage, and therefore the procedure relating to the sale and disposition of property taken under a chattel mortgage has no application.

Plaintiff claims that the matter of the application of the payments is governed by *Northern Nat. Bank v. Lewis,* 78 Wis. 475, 47 N. W. 834, and *First Nat. Bank v. Finck,* 100 Wis. 446, 76 N. W. 608. Respondent contends that it is governed by the principles applied in *Jenkins v. Gunnison,* 50 Wis. 388, 7 N. W. 256, 423.

In disposing of this question two things must be taken as clearly established: (1) that the rights of the defendant as guarantor could not be impaired or diminished by any contract made between the mortgagor and the mortgagee subsequent to the time of the making of the guaranty, and (2) that at the time of the sale of the property, which was by the terms of the contract, to the extent of the proceeds of the sale, to be a voluntary payment by the mortgagor, none but the first and second note was due. There is no direct evidence as to what application, if any, the plaintiff made of the proceeds of the sale. Assuming, however, that the bringing of this suit upon the note guaranteed by the defendant is equiv-

alent to the application of the proceeds of the sale upon the remaining notes of the series, the question arises, Could the plaintiff apply the voluntary payment made by the mortgagor to the notes not yet due, to the prejudice of the guarantor of the note which was then past due?

By the terms of the mortgage the plaintiff had power to declare the whole debt due and to enter upon the premises and take and sell the property. There is no evidence in the case that plaintiff proceeded or attempted to proceed under this clause of the mortgage. The evidence is that the matter was adjusted under the terms of the bill of sale hereinbefore referred to. The plaintiff not having proceeded under the mortgage to declare the amount of the debt due, the contract contained in the bill of sale is of no effect against the defendant, and we must treat the matter as if the maturity of the debt is determined by the terms of the notes to secure the payment of which the chattel mortgage was given. There is no dispute that when a debtor makes a payment without application a creditor cannot apply the amount of the payment to a debt not due, to the exclusion of one due or overdue. 30 Cyc. 1237 and cases cited; *Cain v. Vogt,* 138 Iowa, 631, 116 N. W. 786. Therefore as against the defendant the plaintiff was bound to apply the proceeds of the voluntary payment to the notes in the order of their maturity. Upon making such application the note guaranteed by the defendant must be held to be paid and the defendant discharged.

By the Court.—Judgment affirmed, with costs.

HOVANECK, Appellant, vs. GREAT NORTHERN RAILWAY COMPANY, Respondent.

April 24—May 15, 1917.

Master and servant: Injury to railway employee: Federal statutes: Negligence of fellow-servant: Assumption of risks: Defective sledge hammer: Simple tool.

1. **Under the federal statutes a railway employee engaged in interstate commerce may recover for personal injuries caused by the negligence of a fellow-servant, and does not assume the risk thereof. Whether or not the fellow-servant was theretofore incompetent and known by the employer to be so, is immaterial.**
2. **A complaint alleging that, while plaintiff was holding against a rivet head a chisel which a fellow-servant was striking with a sledge, a glancing blow struck the chisel from his hand and hurled it against his head, and that defendant was negligent in furnishing and allowing the use of the sledge, which was defective and out of repair in that its head was battered and chipped and its handle bent and crooked, but not showing that plaintiff had been engaged in such work for any appreciable time before the injury or that he had had any opportunity to examine the sledge or know of its condition, is *held* to state a cause of action. Under the circumstances stated the sledge cannot be said to have been a simple tool.**

APPEAL from an order of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Reversed.*

The appeal is from an order sustaining defendant's demurrer to plaintiff's complaint.

The cause was submitted for the appellant on the brief of *W. P. Crawford* of Superior, and for the respondent on that of *J. A. Murphy* of Superior.

ESCHWEILER, J. It appears from the complaint that plaintiff was injured while employed by defendant in doing work involving interstate commerce. The plaintiff was holding a chisel against a rivet head on one of defendant's cars while a fellow employee was striking the chisel with a sledge. A glancing blow from the sledge struck the chisel from plaint-

iff's hand and hurled it against his head, severely injuring him.

A fair interpretation of the complaint warrants the construction that the pleader intended to charge at least three alleged grounds of negligence: (1) the carelessness and negligence of the fellow employee in the use of the sledge, whereby a glancing blow was struck on the side of the chisel; (2) that such employee was known to defendant to be incompetent, unfit, and inexperienced and thereby liable to cause injury; that such facts were unknown to plaintiff and that defendant was negligent in retaining such fellow employee in its service; (3) that the hammer furnished to and used by the fellow employee was, to the knowledge of defendant, not reasonably safe for the use to which the same was put, but was defective and out of repair in that the striking head thereof was battered and portions of the same had been knocked out or chipped off, making it liable to slide off the chisel instead of striking it squarely when brought in contact therewith. That the sledge was also defective in that the handle thereof was bent and crooked, making it liable to strike the chisel sideways, and that defendant was negligent in using and allowing such sledge to be used in said work.

The provisions of the United States Compiled Statutes of 1916 (35 U. S. Stats. at Large, 65, ch. 149, secs. 1, 4), under which this action is brought, and material in this case, are as follows:

Section 8657. "Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of the officers, agents, or employees of such carrier."

Section 8660. "In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to . . . any of its employees,

such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury . . . of such employee."

The law is now settled, as has been held by this court as well as by the federal courts, that under these sections the common-law doctrine of nonliability for injuries arising from the negligence of fellow-servants has been abolished and that a liability does arise in favor of an injured employee under the situation specified in that which is described as the first of the above three alleged causes of action. And furthermore, that although under these sections what is known as the employee's assumption of risk is still existing (*Smiegil v. G. N. R. Co.* 165 Wis. 57, 160 N. W. 1057), yet that a liability arising from a fellow-servant's negligence is not one of the risks of the employment still assumed by the employee. *Sweet v. C. & N. W. R. Co.* 157 Wis. 400, 405, 147 N. W. 1054; *Graber v. D., S. S. & A. R. Co.* 159 Wis. 414, 422, 150 N. W. 489; *Central Vt. R. Co. v. White,* 238 U. S. 507, 510, 35 Sup. Ct. 865; *Chicago J. R. Co. v. King,* 169 Fed. 372, affirmed in 222 U. S. 222, 32 Sup. Ct. 79; *Devine v. C., R. I. & P. R. Co.* 266 Ill. 248, 107 N. E. 595, affirmed in *Chicago, R. I. & P. R. Co. v. Devine,* 239 U. S. 52, 36 Sup. Ct. 27; *Pedersen v. D., L. & W. R. Co.* 229 U. S. 146, 149, 33 Sup. Ct. 648; *Carter v. K. C. S. R. Co.* (Tex. Civ. App.) 155 S. W. 638.

This merges, therefore, the second alleged cause of action with the first and renders any consideration of it unnecessary, for it is manifest that, if plaintiff is entitled to recover where his injury resulted in whole or in part from the negligence of a fellow-servant, it becomes immaterial whether such fellow employee was theretofore incompetent and known to be such by the defendant.

We cannot assume from the language of the complaint that the plaintiff had been engaged for any appreciable length of

time before the injury in the particular work in which this sledge was being used, or that plaintiff had any opportunity himself to examine the same or know of its condition so as to charge him with knowledge of the method in which the work was done and the dangers incident thereto. *Gila Valley, G. & N. R. Co. v. Hall,* 232 U. S. 94, 101, 34 Sup. Ct. 229.

The situation, therefore, is not the same as in many of the cases relied upon by defendant of the master furnishing to the servant for his own use tools like the sledge in this case. If, therefore, the facts shall show that this hammer, owing to its condition, was a defective and unsafe tool to be used in the work at which plaintiff was then employed and that the injury resulted therefrom, there may be sufficient to predicate liability against the defendant for the resulting injury under the rule laid down by this court in the case of *Ruck v. C., M. & St. P. R. Co.* 153 Wis. 158, 168, 140 N. W. 1074.

We are satisfied, therefore, that upon the face of the complaint there appear sufficient facts alleged to withstand the demurrer and that the court below was in error in sustaining it.

By the Court.—The order of the circuit court is reversed, and the cause remanded for further proceedings.

CRYSTAL SPRING BROOK TROUT HATCHERY COMPANY, Appellant, vs. VILLAGE OF LOMIRA, Respondent.

April 24—May 15, 1917.

Nuisance: Pollution of springs and ponds of fish hatchery: Municipal corporations: Surface drainage: Sewers: Streets: Rights of abutting owners.

1. **In an action to abate a nuisance and for damages, findings by the trial court to the effect that the pollution or defilement of plaintiff's springs and ponds, used by it in conducting a fish hatchery, was not in any manner caused by acts of the defendant village, are *held* to be sustained by the evidence, from which it appeared, among other things, that such springs and ponds are in the course of the natural surface drainage of a large area including a considerable part of the village, that private drains had been constructed by plaintiff, its predecessor in title, and other property owners on the streets, that the village had not built or authorized any such drains or any sewers, and that street improvements affecting the flow of surface water had been made solely in the discharge of the duty of the village to care for its streets.**
2. **Although the village had power to lay out a general sewerage system it was not liable in this case for failure to do so.**
3. **Abutting owners have certain rights in the streets of a municipality not inconsistent with the servitude to which the street is subject, and the municipality is not liable for the exercise of those rights by such owners.**

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This action was brought to abate an alleged nuisance claimed to have been maintained by the defendant village. The relief demanded in the complaint is (1) damages; (2) that defendant be enjoined from continuing the alleged nuisance; and (3) that defendant be compelled to install and maintain a sewerage system.

The answer put in issue the material allegations of the complaint. After the trial the court made a detailed statement of the established facts, which appears in the record, and made findings of fact and conclusions of law; also filed

an opinion in the case holding that upon the established facts no case was made against the defendant, and ordered judgment in favor of the defendant dismissing the complaint with costs. Judgment was entered accordingly, from which this appeal was taken.

The cause was submitted for the appellant on the briefs of *Roehr & Steinmetz* of Milwaukee; and for the respondent on that of *T. L. Doyle* of Fond du Lac.

KERWIN, J. The trial judge immediately upon the conclusion of the trial, in the presence of counsel of both parties, made a statement of what he found the facts established by the evidence to be, and afterwards made findings of fact and conclusions of law based upon the established facts found.

The court below found the facts at great length and in detail, and we shall not recite the findings here. It is sufficient to say that as part of the findings in detail showing that the defendant did not contribute to the creation of a nuisance or damage to plaintiff, the court concluded by finding "that the pollution or defilement of the said stream and ponds of the plaintiff is not in any manner caused or occasioned by acts of the defendant village." The court further found that the plaintiff's springs and ponds are located within the course of the natural surface drainage of a large area of land lying to the east, north, southeast, and northeast, upon a portion of which area is located a considerable part of the defendant village.

Several authorities are cited by counsel for appellant where sewers have been built or authorized by the municipality in such manner as to do injury to private property and damage the owners thereof, but these cases have no application to the instant case.

In the instant case the findings, supported by the evidence, show that no case is made against the defendant upon the established facts. While it is true that the defendant had

power to lay out a general sewer system it was not liable in the instant case for failure to do so. *Kelley v. Milwaukee,* 18 Wis. 83; *State ex rel. Rose v. Superior Court,* 105 Wis. 651, 81 N. W. 1046; 28 Cyc. 917 and cases cited.

Upon the established facts drains were constructed by plaintiff, its predecessors in title, and other property owners on the streets in the defendant village, and the defendant is not liable for the acts of such parties. The abutting owners have certain rights in the streets of a municipality not inconsistent with the servitude to which the street is subject, and the municipality is not liable for the exercise of such rights by the abutting owners. *Papworth v. Milwaukee,* 64 Wis. 389, 25 N. W. 431; *Krueger v. Wis. T. Co.* 106 Wis. 96, 81 N. W. 1041; *Johnston v. Lonstorf,* 128 Wis. 17, 107 N. W. 459.

The general topography of the country, as appears from the record, shows that the natural flow of the surface water is into the pond in question, and any improvements made in the street or elsewhere by the defendant were done in the discharge of the defendant's duty in caring for its streets and without injury to the plaintiff or liability on the part of the defendant therefor. *Waters v. Bay View,* 61 Wis. 642, 21 N. W. 811; *Harp v. Baraboo,* 101 Wis. 368, 77 N. W. 744; *Merkel v. Germantown,* 120 Wis. 494, 98 N. W. 210; *Champion v. Crandon,* 84 Wis. 405, 54 N. W. 775; *Shaw v. Ward,* 131 Wis. 646, 111 N. W. 671; *Stoecker v. Cedarburg,* 161 Wis. 34, 152 N. W. 445.

There are other propositions in the case which might be considered tending to show nonliability on the part of defendant, but sufficient has already been said to show that plaintiff made no case against defendant, hence the complaint must be dismissed.

By the Court.—The judgment of the court below is affirmed.

JEROME P. PARKER-HARRIS COMPANY, Appellant, vs. KISSEL MOTOR CAR COMPANY, Respondent.

April 25—May 15, 1917.

Contracts: Validity: Interstate commerce: Unlicensed foreign corporation.

1. A purchase of goods in this state for shipment to and sale in other states constitutes interstate commerce; and the fact that the title to the goods passes to the purchaser in this state is immaterial.
2. The fact that the purchaser in such a case, a foreign corporation, has not complied with sec. 1770*b*, Stats., does not render the contract void on its behalf.

APPEAL from an order of the circuit court for Washington county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

Action for damages for breach of contract. Defendant is a domestic corporation manufacturing motor cars at Hartford, Wisconsin. Plaintiff is a Tennessee corporation domiciled at Memphis, Tennessee. In March, 1910, plaintiff at Hartford, Wisconsin, through its president, entered into an agreement with the defendant whereby the latter allotted to plaintiff the states of Tennessee, Mississippi, Louisiana, and Arkansas for a certain period of time within which to sell defendant's motor cars; and the plaintiff agreed to purchase of the defendant a certain number of motor cars at stated intervals for a specified price f. o. b. cars at Hartford to be shipped as directed by plaintiff, and to be handled by it as independent merchants in the territory above designated. The contract provided that plaintiff was "not to sell said automobiles in any territory than herein specified, except upon written consent of first party [defendant], and in case of unauthorized sales in other territory it will pay to the first party a sum equal to the discount under this contract on the car sold." Plaintiff claims damages because of defendant's delay in filling orders as per contract and because of

its wrongful invasion of plaintiff's territory and the conversion of a deposit made with it. The defendant, among other defenses, alleged that plaintiff had never complied with the provisions of sec. 1770*b*, Stats. 1915. To this defense plaintiff demurred, and from an order overruling the demurrer it appealed.

For the appellant there was a brief by *Stuart H. Markham* and *John Cudahy* of Milwaukee, and oral argument by *Mr. Cudahy.*

For the respondent the cause was submitted on the brief of *Sawyer & Sawyer* of Hartford.

VINJE, J. The appeal raises the question whether the transactions set out in the statement of facts constitute interstate commerce. If they do, the provisions of sec. 1770*b*, Stats. 1915, do not apply to them. *Charles A. Stickney Co. v. Lynch,* 163 Wis. 353, 158 N. W. 85. The essential features of the dealings between the parties show that plaintiff's president came to this state to purchase motor cars from a domestic manufacturer to be shipped out of the state and sold in foreign territory. Such transactions constitute interstate commerce in substantially as pure and simple a form as it is possible to have them occur. In *Loverin & Browne Co. v. Travis,* 135 Wis. 322, 115 N. W. 829, this court held that transactions involving a physical transfer of merchandise from the possession and title of an owner in one state to the possession and ownership of purchasers in another state are interstate. That is just what this contract provided for. Defendant argues that the cars might be sold in Wisconsin by obtaining its consent. True, but that would be making another and different contract. If sold in this state without its consent, a heavy penalty must be paid. So it is clear that if the contract actually entered into is observed, the motor cars must be sold in the specified foreign territory and nowhere else. That the title passes to plaintiff in this state is

immaterial. The fact remains that there was a purchase of goods in one state for shipment to and sale in other states and that constitutes interstate commerce. *Greek-American S. Co. v. Richardson D. Co.* 124 Wis. 469, 102 N. W. 888; *Catlin & Powell Co. v. Schuppert,* 130 Wis. 642, 110 N. W. 818; *Loverin & Browne Co. v. Travis,* 135 Wis. 322, 115 N. W. 829; *United States G. Co. v. Gleason,* 135 Wis. 539, 116 N. W. 238; *F. A. Patrick & Co. v. Deschamp,* 145 Wis. 224, 129 N. W. 1096; *Regina Co. v. Toynbee,* 163 Wis. 551, 158 N. W. 313.

By the Court.—Order reversed, and cause remanded for further proceedings according to law.

KOMULA and others, Respondents, vs. GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., OF PERTH, SCOTLAND, Appellant.

April 25—May 15, 1917.

Reformation of contracts: Employer's liability insurance: Misnomer of insured: Failure to discover mistake: Estoppel: Employee or independent contractor? Payment of loss "in money."

1. A court of equity has power to reform a contract so as to correct a misnomer of a party, and in so doing it does not make a new contract or substitute one party for another.
2. An application for workmen's compensation insurance was made on behalf of plaintiffs, a firm doing business as the J. K. Co., but through a mistake the policy was issued by defendant to "J. K., an individual." It was delivered in December, 1913, to one of the partners, who put it in a safe without reading it. The partners were all Finlanders, unfamiliar with business of that nature and, except one, unable to read or write English. J. K. as an individual had no employees and had no benefit of the policy. In February, 1914, an employee of the firm was injured, and in December, 1915, after proceedings of which defendant had notice, an award made by the industrial commission and confirmed by the circuit court was paid by the firm to said employee. In March, 1916, this action was brought to re-

form the policy and recover the amount of such award. *Held*, that the failure to discover the error in the policy was excusable and that plaintiffs were not estopped. *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, distinguished.

3. The fact that the compensation of a man subject to the general direction of an employer is fixed on the basis of the amount of work done rather than on the amount of time spent, is not controlling in determining whether he is an employee or an independent contractor.

4. Where an award to an injured employee was paid to him partly in cash, and the remainder ($450) by the conveyance to him of land of the fair market value of $450, which he wished to purchase and which it was agreed that he would accept in lieu of said sum, and there was nothing to indicate collusion or bad faith in the transaction, there was a substantial compliance with a condition in an indemnity insurance policy that the loss should have been paid by the employer "in money."

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The John Komula Company is a firm consisting of *John Komula,* his sons and sons-in-law, and is engaged in the business of logging. The firm purchased a tract of timber in November, 1912, and in September, 1913, they requested Morner, from whom they purchased the timber, to take out a policy of workmen's compensation insurance for them. Morner made such application to the agent of the defendant company at Phillips. Morner testified that he gave the name of the insured as John Komula Company. Defendant's agent denied this and claimed the application was in the name of *John Komula* individually. The application was made over the telephone. The written application was signed by the agent of the company and in it the name was given as *John Komula.* The application was sent to the defendant, and shortly thereafter a policy was issued to "*John Komula,* an individual," and was delivered to *Gust Komula,* one of the partners, who put it in a safe without reading it. February 7, 1914, one Stewart, an employee of the plaintiffs, received an injury resulting in the loss of an eye. In October, 1914,

Stewart filed an application with the industrial commission to recover compensation for his injury, naming *John Komula* as respondent. The complaint was answered by John Komula Company. The defendant company, having notice of the proceeding, filed with the industrial commission an answer on behalf of *John Komula*. In November, 1914, the commission entered an award against the John Komula Company and the defendant. An action to review the award was begun by both respondents. Upon the hearing the circuit court for Dane county affirmed the order of the commission as to the John Komula Company and reversed it as to the defendant company on the ground that said company was not a party to and had not appeared in said proceeding. On December 31, 1915, the award, amounting to $1,283.73, was paid voluntarily, $833.73 being paid in cash and $450 being paid by the company deeding to Stewart a certain quantity of land which it is agreed and admitted was worth $450.

This action was begun in March, 1916, to reform the policy of insurance issued by the defendant company and to recover the amount paid by the plaintiff to its employee, Stewart. The case was tried by the court. The court found that the application was made on behalf of John Komula Company and found other facts substantially as stated. Judgment was entered reforming the policy and for $1,283.73, with interest from December 31, 1915. From this judgment defendant appeals.

For the appellant there was a brief by *Lines, Spooner, Ellis & Quarles* and *James T. Guy*, all of Milwaukee, and oral argument by *Charles B. Quarles*.

For the respondents there was a brief by *Tullar & Tullar* of Waukesha, and oral argument by *D. S. Tullar* and *M. S. Tullar*.

ROSENBERRY, J. It is contended (1) that a court of equity cannot modify a contract so as to work a substitution of

parties; (2) that plaintiffs are estopped by the retention of the contract an unreasonable length of time without objection; (3) that the findings are not supported by the evidence; (4) that Stewart was not an employee within the meaning of the Compensation Act, but was an independent contractor; (5) that plaintiffs at most can recover only the amount paid in cash, $832.73.

1. It is urged that a court of equity cannot reform a contract so as to work a substitution of parties. Under the facts in this case we are of the opinion that this rule has no application here. There was no attempt to make a new contract or to substitute one party for another, but to make the contract speak the truth and set forth the contract actually made. There was but one contract made, and under the findings of the court that was the contract made by John Komula Company. The court has ample power to compel the reformation of the contract so as to correct a misnomer, and in so doing it does not make a new contract or substitute one party for another.

2. It is claimed that the plaintiffs are estopped under the doctrine of *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246. We think the situation in the instant case is clearly distinguishable from that in *Bostwick v. Mut. L. Ins. Co.* In this case there is no dispute as to the contract which was in fact to be delivered. It is claimed upon one side that there is an error in the description of the parties, and it is claimed upon the other side that no such error exists. The fact has been found adversely to the contention of the defendant. The defendant is not injured, and the plaintiff or *John Komula* has gained nothing. It being an undisputed fact that *John Komula* had no employees individually, he therefore accepted no benefits under the contract. If *John Komula* were at the same time carrying on business as an individual and had had the benefit during the interim of the policy of insurance as issued in this

case, a different situation would be presented. We think the plaintiffs were not estopped and that their failure to notice the error in the contract was excusable, as found by the trial court; it appearing that the plaintiffs were all Finlanders, none of them able to read or write English except *Gust,* who had a limited knowledge of the language, and all were unfamiliar with the conditions under which business of this character is done.

3. Other objections are made which amount to a contention that the findings are not supported by the evidence. A careful examination of the evidence convinces us not only that the court was not clearly wrong, but that it was clearly right, and its findings are amply supported.

4. It is contended that Stewart was not an employee, but was an independent contractor. The trial court affirmed the finding of the industrial commission holding that Stewart was an employee and not an independent contractor. Even if the judgment of the circuit court is not binding upon the defendant because the defendant was not properly a party, an examination of the record convinces us that the question was correctly decided. The fact that the compensation of a man subject to the general direction of an employer is fixed on the basis of the amount of work done rather than on the amount of time spent, is not controlling.

5. The court found and the undisputed fact is that the tract of land conveyed to Stewart was of the fair market value of $450. The purpose of the clause in the policy of insurance requiring the loss to be paid in money is correctly stated by the defendant to be as follows: "The purpose of the insurer in framing this clause was to protect itself against fraud in the payment of losses." There are no circumstances indicating that there was any collusion or bad faith in the transaction. Stewart desired to purchase the land; the plaintiffs desired to sell it, and as a part of the payment of the award it was agreed that the land should be accepted in

lieu of the sum of $450. Had the plaintiffs paid the full amount and Stewart immediately handed back $450 and received the deed in question, the terms of the policy would have been literally complied with. Under the facts in this case, we think the provisions of the policy were substantially complied with, and that plaintiffs may recover the full amount of the award.

By the Court.—Judgment affirmed, with costs.

McGovern, Respondent, vs. Ann Arbor Railroad Company, Appellant.

April 25—May 15, 1917.

Carriers: Shipment at "owner's risk:" Freezing of apples in transit: Liability of carrier: Negligence: Evidence.

1. By accepting a bill of lading including the words "owner's risk," or letters understood by the parties to be their equivalent, a shipper relieves the carrier from its responsibility as an insurer and limits the same to responsibility for negligence.
2. A carload of apples was shipped from Michigan across Lake Michigan to Wisconsin late in December. By its published tariff (which was part of the contract) the carrier offered the shipper the opportunity of putting a stove in the car with a man in charge of it, but did not offer to warm or house the car itself. The shipper did not accept such offer, but, by accepting the bill of lading with the letters O. R. (owner's risk), chose to assume the risks incident to an ordinary and expeditious transit of the car. The car went through on schedule time, but on its arrival in Wisconsin the apples were found to be frozen. There was no evidence of a custom on the part of railroad companies to "round-house" such shipments *en route*. *Held*, that no negligence of the carrier was shown.

Appeal from a judgment of the circuit court for Waukesha county: Martin L. Lueck, Circuit Judge. *Reversed.*

A carload of apples was shipped over the defendant's railway and carferry line by one Wayne Mick at Beulah, Michi-

gan, to the plaintiff at Waukesha, Wisconsin, December 22, 1914, and were badly frozen in transit, and this action is brought to recover damages therefor. It was tried by the court without a jury. The defendant is a foreign corporation operating a railroad in Michigan terminating at Frankfort, and a carferry from Frankfort to Manitowoc, Wisconsin, which transports the cars to the terminal and yards of the company at that place.

The defendant furnished the car and received the same loaded with apples by Mick at Beulah at 4:30 p. m. December 22, 1914, and issued a bill of lading therefor to the plaintiff at Waukesha as consignee, the connecting carrier from Manitowoc to Waukesha being designated as the Chicago & Northwestern Railway. The thermometer at that time stood at about twenty degrees above zero. Mick had kept a heater in the car while it was being loaded, but when the car was accepted for shipment the heater was removed by direction of the defendant's agent. The car left Beulah by the first train after the loading was completed and arrived at Frankfort on Lake Michigan at 7:50 p. m. of the 22d. It stood on the sidetrack at Frankfort until 9:20 a. m. on the following morning, when it was placed on the first carferry sailing after the arrival of the car in Frankfort. It arrived at Manitowoc at 4:10 p. m. of the same day, and was delivered to the Chicago & Northwestern Railway Company at 4:40 p. m., inspected by the latter company, and the apples found to be frozen. It arrived in Waukesha on the 26th of the same month. The maximum temperature at Manitowoc on the 23d of December was seven degrees above zero and the minimum five degrees below zero. The bill of lading contained the notation on the face, "O. R.—Charges guaranteed." The published tariffs of the defendant company made no provision for the heating of cars used for the transportation of vegetables or fruits, but provided that in case stoves and fuel were provided by the consignor one or more men must accompany them to care for the fire, one of whom would be carried

free. The tariff contained further provisions as to the manner in which stoves furnished by consignors should be put up and fastened and the kind of fuel to be used. The trial judge found that the apples were received in good condition; that by reason of defendant's negligence in failing to protect them from frost they were frozen while in defendant's custody, and rendered judgment for the plaintiff for the value of the apples so frozen and the freight charges, and the defendant appeals.

M. A. Jacobson of Waukesha, for the appellant.

For the respondent there was a brief by *Tullar & Tullar* of Waukesha, and oral argument by *D. S. Tullar* and *M. S. Tullar.*

WINSLOW, C. J. There was ample proof that the apples were in good condition when received by the company, and the only serious question on this appeal is whether there is any sufficient proof of negligence on the part of the railway company.

It appears without dispute that the letters "O. R." (meaning "owner's risk") were on the face of the bill of lading when the consignor (who was also the owner) received it. The consignor testified that at the time he signed the bill of lading it contained the indorsement "Owner's risk—Charges guaranteed," that he understood the situation and the weather conditions at the time, that the matter of weather was then talked over with reference to the apples freezing in the car, and that the bill of lading was made out with reference to the conditions then existing. He makes no claim that he did not fully understand that the letters "O. R." meant "owner's risk," nor does he claim that he was ignorant of the fact that in the regular course of the defendant's business considerable time must necessarily elapse after the car arrived in Frankfort before it was taken upon the carferry.

By the acceptance of the bill of lading including the words "Owner's risk," or the letters understood by the parties to be

their equivalent, the consignor relieved the carrier from its responsibility as an insurer and limited the same to responsibility for negligence. *Abrams v. M., L. S. & W. R. Co.* 87 Wis. 485, 58 N. W. 780; 4 Elliott, Railroads, sec. 1425. Was negligence shown? We are unable to reach that conclusion. The shipping contract was made in the dead of winter, when both parties knew that zero weather was liable to come at any time, and the weather conditions were fully understood and discussed. The company by its published tariff (which was part of the contract) offered the shipper of such property the opportunity of putting a stove in the car with a man in charge of it under certain conditions, but did not offer to warm or house the car itself. The shipper did not choose to put a stove in the car under the conditions offered, but decided (by accepting the bill of lading) to assume the risks incident to an ordinary and expeditious transit of the car to its destination, one of the most obvious of which was the risk of freezing. The car went through expeditiously and on schedule time. The damage resulted not from delay nor from any act or omission of the defendant, but from the operation of a cause beyond the control of either party. In the published tariff of the defendant there is no provision for the furnishing of heat in the transportation of vegetables or fruits; the rule hereinbefore referred to authorizing the shipper to furnish a man and stove is the only provision on the subject contained in the tariff. This tariff having been approved by the interstate commerce commission is absolutely controlling, and the railroad company is not permitted to give greater or less service than it provides. There is no evidence of any custom on the part of railway companies to "roundhouse" such shipments *en route* as was the case in *Victor P. Co. v. C. & N. W. R. Co.* (Minn.) 160 N. W. 201. We fail, therefore, to find any evidence on which the conclusion of negligence can be based.

By the Court.—Judgment reversed, and action remanded with directions to dismiss the complaint.

PETERS, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY and another, imp., Respondents.

April 26—May 15, 1917.

Railroads: Construction in street: Consent by abutting owner: Remedies: Action for trespass: Contract: Pleading: Amendment: Condemnation proceeding.

1. The construction of a railroad in front of plaintiff's land but on the farther half of the street and not taking any of his property—which, it is *held*, is the situation shown by the complaint in this case—was authorized by sub. (5), sec. 1828, Stats., and was not a trespass upon plaintiff's land, but entitled him, under sec. 1296*a*, to compensation for any consequential damages suffered through impairment of his rights appurtenant to the property.
2. Consent by a landowner to such occupancy of the street by a railroad company, subject to his right to compensation, is a waiver of the right to sue for damages and to restrain the continuance of such occupancy, and his only remedy is by condemnation proceedings under sec. 1852, Stats.
3. A complaint alleging that plaintiff desisted from protesting against construction of the track upon being assured that he would be compensated for the taking of the street and any damage sustained by him, did not set forth a cause of action on express contract where the purpose of the action clearly was to recover damages and, in effect, to compel a removal of the track.
4. Plaintiff in such case, having made no further protest until after the track was completed and trains were running thereon, in effect consented to the occupancy of the street and, by force of the statute, there arose an implied contract on the part of the railroad company to pay to him his legal damages, to be determined in condemnation proceedings; and there is no foundation for an action as for trespass or to abate a nuisance.
5. A demurrer to the complaint in such case was properly sustained; but under sec. 2836*b*, Stats. 1913, the action need not be dismissed but may, by amendment, be turned into a proceeding for condemnation.

APPEAL from an order of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a general demurrer to plaintiff's complaint.

This, in substance, is the complaint so far as necessary for understanding the claimed infirmities thereof:

Since before the acts complained of, plaintiff owned and occupied as his residence lot 1 of Riverview addition to the city of Waukesha, Wisconsin, which fronted upon White Rock avenue and Harrison street in said city. About September 4, 1900, by ordinance, the city council of such city, in form, granted to defendant *Chicago & Northwestern Railway Company* the right to construct its tracks in said city across Main street, near the intersection of the northerly line of Wisconsin Central avenue, as shown by the plat of the Waukesha Land & Improvement Company's addition, in and along and near the northerly line of said avenue, and in and along and near the southerly line of Harrison street, across White Rock avenue, the unnamed street in block B of Cook's addition, and across Locust street between block B of Cook's addition and Gauthe's addition. Later said company conveyed such privilege to the *Minneapolis, St. Paul & Sault Ste. Marie Railway Company* under such conditions as to secure to the two companies a joint interest in the railway tracks when constructed. Later, in September, 1915, without first acquiring the property rights of plaintiff affected by the construction of said tracks, the second named company commenced such construction on Harrison street and across White Rock avenue, in the immediate vicinity of plaintiff's premises. He did not consent thereto or know, until the tracks were laid, what work was being done. As soon as he had such knowledge, he protested to the officers and agents of the railway company in charge of the matter to the further continuance of the construction work and laying of tracks and was then assured that the companies would pay him compensation for taking said street and any damages thereby sustained by him, and, relying thereon, he ceased to protest until after operation of cars on the tracks commenced. He then demanded compensation for taking and interference with his property, which was re-

fused. The operation of trains of cars on said tracks obstructs the street and deprives plaintiff of proper access to his property and otherwise injures such property, in violation of sec. 1296*a*, Stats. Since the construction of such tracks, said companies have been trespassing upon plaintiff's property and maintaining a nuisance in respect to the same. As a result thereof, such property has been lessened in value and made unsuitable for residence purposes. The wrong is a continuing one to his damage in the sum of $2,000.

Plaintiff asked for relief by way of an injunction to prevent further damages to his property and for compensation for damages already caused, with costs.

For the appellant there was a brief by *C. E. Armin* of Waukesha and *Glicksman, Gold & Corrigan* of Milwaukee, attorneys, and *Arthur J. Pellette* of Milwaukee, of counsel, and oral argument by *Mr. Pellette.*

R. N. Van Doren of Milwaukee, for the respondent *Chicago & Northwestern Railway Company.*

For the respondent *Minneapolis, St. Paul & Sault Ste. Marie Railway Company* the cause was submitted on the brief of *W. A. Hayes* of Milwaukee.

MARSHALL, J. The respondents had authority to construct their track and maintain and use the same on the street upon which plaintiff's property abutted, and "in the immediate vicinity" of such property, under sub. (5), sec. 1828, Stats., subject to sec. 1836, Stats., conditioned upon rendering to him just compensation as to any of such property taken and, in addition, such compensation for any consequential damage suffered by him by reason of any impairment of his rights appurtenant to such property secured to him by sec. 1296*a*, Stats. No ordinance of the city of Waukesha could authorize more so as to impair such right.

Appellant claims the complaint states a cause of action for redress for a wrong committed by respondents in having

trespassed upon his property and to restrain them from continuing to trespass thereon; but it seems that the pleading does not show, expressly or inferentially, that he is the owner or in possession of the land in the street, on which the tracks exist. Without such ownership or possession, there could be no trespass upon his property, though there might be a violation of his right appurtenant thereto. The complaint seems to expressly negative any such ownership or possession by the language charging that the "*Minneapolis, St. Paul & Sault Ste. Marie Railway Company* did commence, and actually construct, railroad tracks in and along . . . Harrison street and across White Rock avenue, and in the immediate vicinity of the premises owned by this plaintiff, and which said premises do front and abut on White Rock avenue and Harrison street."

Giving to the quoted language the most liberal construction which it will reasonably bear, in view of other language of the pleading to the effect that respondents' acts were in violation of appellant's rights under sec. 1296*a* entitling him to an unobstructed street for its full width in front of his property, the charge is that respondents constructed their track in front of appellant's property on the far half of the street. Such an occupancy did not take any of his property. It merely interfered with a right incident to the ownership on his side of the street up to the center line thereof; an interference resulting in consequential damages only, which, the railroad being a lawful structure, would be *damnum absque injuria* if it were not for the statutory right to recover therefor conferred by sec. 1296*a*, Stats. The subject is fully covered in *Kuhl v. C. & N. W. R. Co.* 101 Wis. 42, 77 N. W. 155. This seems to be a mere action to restrain the further infliction of consequential damages to plaintiff and to recover such damages already inflicted.

While we have thus briefly discussed the question of whether the wrong to appellant disclosed by the pleading is

a trespass by a taking of property owned by him, or a mere invasion of a right appurtenant thereto which is remediable, because the wrong was denominated a trespass in the complaint, and counsel on both sides gave much attention to the matter as if it were of vital consequence, it is immaterial, since, in either case, this action would lie if appellant did not waive the remedy invoked by consenting to respondents' occupancy of the street subject to his right to compensation. If he did, then the remedy therefor is by condemnation proceedings under sec. 1852, Stats. *Frey v. D., S. S. & A. R. Co.* 91 Wis. 309, 64 N. W. 1038; *Kuhl v. C. & N. W. R. Co.* 101 Wis. 42, 77 N. W. 155; *Cronin v. Janesville T. Co.* 163 Wis. 436, 158 N. W. 254.

It is suggested that the complaint sets forth a cause of action on express contract, in that it is alleged that appellant desisted from protesting against construction of the track upon being assured that he would be "compensated for the taking of such street and any damages sustained" by him. But it is quite clear that the action was not to recover on such a contract. Compensation of that sort would involve an acquirement of the right to the interference with plaintiff's property or right appurtenant thereto, while the purpose sought here is to recover past damages and prevent further damages by compelling respondents to desist from maintaining the track. If there were such a contract, as the one alleged, appellant repudiated it by prosecuting this action, in effect, for a removal of the track. It seems that the allegation as to compensation and appellant desisting from protesting upon assurance thereof, was inserted to indicate that he did not waive the particular remedy and elect to rely upon that of condemnation, by consenting to the construction and maintenance of the track.

The trial court evidently came to the conclusion that appellant consented to respondents' act and chose to rely upon his right to the compensation therefor, which he was entitled

to by law and which is recoverable in condemnation proceedings, and so waived the right to prosecute such an action as this. It seems that such consent and waiver appears quite clearly by the pleadings. Respondents knew that if they invaded appellant's property, or violated a remediable right appurtenant thereto secured to him by the written law, they were bound to compensate him therefor, and the only reasonable inference, under all the circumstances, is that their assurance of compensation had reference thereto, the amount to be paid, unless agreed upon, to be awarded, in due course, in the statutory way. When the assurance was given, it is alleged that appellant "made no further protest until after defendants, railway companies, commenced to operate trains over the highways." That is to say, relying upon his attitude of consenting by ceasing to protest, they, without first making compensation to him, continued construction of the track to completion and put the same to use by operating trains thereon and that then he commenced this action, among other things, to compel them to remove the track.

It seems that the situation thus created satisfied the principle of the cases before cited. Out of the circumstances, by force of the statute, there arose an implied contract on respondents' part to pay appellant his legal damages, determinable in condemnation proceedings, unless agreed upon, and in no other way. In the words of *Kuhl v. C. & N. W. R. Co.* 101 Wis. 42, 77 N. W. 155, "The assent waived the tortious taking, if there were such, and an obligation in the nature of an implied contract between the parties arose from the situation,—on the one part to pay the legal damages caused to plaintiff's land by the construction of the road, and on the other to accept the same in full for the permanent right to maintain such road as regards its effects upon plaintiff's lands,"—a mere "chose in action" enforceable, if necessary, by the special remedy provided by statute. Express or implied consent to the appropriation by railroad companies of

land, or rights appurtenant thereto, as in this case, is a relinquishment of the thing appropriated and acceptance of the legal compensation therefor, with the special remedy incident thereto. Thereby the very foundation of a trespass action becomes impossible, rendering the doctrine of trespass, continuous trespass, and nuisance actions inapplicable to the situation thus created.

It follows that the demurrer to the complaint was properly sustained.

Notwithstanding the result of this appeal, the action need not necessarily be dismissed. As held in *Cronin v. Janesville T. Co.* 163 Wis. 436, 440, 158 N. W. 254, under sec. 2836*b*, Stats. 1913, the trial court should permit the plaintiff, by proper amendment within a reasonable time, costs being in the discretion of the court, to turn the action into a proceeding for condemnation, and to prosecute the same as if regularly commenced, and render a judgment of dismissal only on neglect to so amend.

By the Court.—The order is affirmed, and the cause remanded to the circuit court for further proceedings in accordance with this opinion, one bill of costs to be taxed in each case.

NUSS, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY and another, imp., Respondents.

April 26—May 15, 1917.

Peters v. Chicago & N. W. R. Co., ante, p. 529, followed.

APPEAL from an order of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a general demurrer to the complaint.

For the appellant there was a brief by *C. E. Armin* of Waukesha and *Glicksman, Gold & Corrigan* of Milwaukee, attorneys, and *Arthur J. Pellette* of Milwaukee, of counsel, and oral argument by *Mr. Pellette.*

R. N. Van Doren of Milwaukee, for the respondent *Chicago & Northwestern Railway Company.*

For the respondent *Minneapolis, St. Paul & Sault Ste. Marie Railway Company* the cause was submitted on the brief of *W. A. Hayes* of Milwaukee.

MARSHALL, J. The questions presented here are identical with those in *Peters v. C. & N. W. R. Co., ante,* p. 529, 162 N. W. 916, and the appeal is ruled in favor of respondents by the result in that case.

By the Court.—The order is affirmed, and the cause remanded to the circuit court for further proceedings in accordance with this opinion, one bill of costs to be taxed in each case.

TURKOWSKI, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY and another, imp., Respondents.

April 26—May 15, 1917.

Peters v. Chicago & N. W. R. Co., ante, p. 529, followed.

APPEAL from an order of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a general demurrer to the complaint.

For the appellant there was a brief by *C. E. Armin* of Waukesha and *Glicksman, Gold & Corrigan* of Milwaukee, attorneys, and *Arthur J. Pellette* of Milwaukee, of counsel, and oral argument by *Mr. Pellette.*

R. N. Van Doren of Milwaukee, for the respondent *Chicago & Northwestern Railway Company.*

For the respondent *Minneapolis, St. Paul & Sault Ste. Marie Railway Company* the cause was submitted on the brief of *W. A. Hayes* of Milwaukee.

MARSHALL, J. The questions presented here are identical with those in *Peters v. C. & N. W. R. Co., ante,* p. 529, 162 N. W. 916, and the appeal is ruled in favor of respondent by the result in that case.

By the Court.—The order is affirmed, and the cause remanded to the circuit court for further proceedings in accordance with this opinion, one bill of costs to be taxed in each case.

THIENSVILLE CREAMERY COMPANY, Respondent, vs. HICKCOX, imp., Appellant.

April 26—May 15, 1917.

Guaranty: Construction: Acceptance: Notice: Mutual assent: Evidence.

1. A letter from defendant to plaintiff stating, "I will guarantee your account with T. up to $250. My understanding being that settlements will be made on the first and fifteenth of each month," is *held* to have been intended as a guaranty of payment of any unpaid part, up to $250, of T.'s account for goods purchased from plaintiff; and when accepted by plaintiff was operative until revoked.
2. A finding by the trial court to the effect that, although there was no formal acceptance of such guaranty and notice thereof to defendant, yet the parties dealt with each other as if formal notice had been given, and that defendant had actual notice of such acceptance, is *held* to be sustained by the evidence.
3. There being evidence tending to show that the amount due on T.'s account on the 15th of one month was paid by a check signed by defendant and delivered to plaintiff by T., defendant's denial that he had signed and issued any such check was not conclusive upon the court.

APPEAL from a judgment of the circuit court for Ozaukee county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This is an action by the plaintiff to recover from *J. Gilbert Hickcox* (hereinafter designated the defendant) $197 damages and $103.33 costs on an alleged contract of guaranty whereby the latter is alleged to have guaranteed the plaintiff against loss through the failure of Fred Turner to pay it for butter sold to him. Fred Turner, not having been served, makes no appearance in person or by attorney in the action.

Fred Turner did business under the name of the Farm Products Company. He applied to the plaintiff, engaged in the manufacture and sale of butter, to purchase butter from it on credit. He was informed by its officers that he could purchase butter from it on credit only if he brought a written guaranty from a responsible guarantor.

On July 29, 1913, the defendant *Hickcox* gave to Turner the following letter, which Turner delivered to the plaintiff:

"*Thiensville Creamery,*
"Thiensville, Wis.

"Gentlemen: I will guarantee your account with Fred Turner up to $250. My understanding being that settlements will be made on the first and fifteenth of each month.

"Yours truly, J. GILBERT HICKCOX."

The plaintiff made no formal reply of acceptance to this letter, but after inquiring as to *Hickcox's* financial condition shipped butter to Turner from July 30, 1913, to September 2, 1913.

On August 16, 1913, the account up to and including August 15, 1913, then amounting to the sum of $197, was paid by a check which had the name of *J. Gilbert Hickcox* as signer.

On September 2, 1913, *Hickcox* wrote to the plaintiff withdrawing the guaranty for the account of Fred Turner and no more shipments of butter to Turner were made by the plaintiff. The unpaid balance of the account for deliveries of butter to the last of August amounted to $197.24.

The defendant alleges that his letter of July 29, 1913, was merely an offer of guaranty, and that no acceptance of the proposal was ever made by the plaintiff and that he at no time considered himself bound by the offer.

A trial by jury was waived, and the court found that a valid contract of guaranty existed between the plaintiff and the defendant and that the defendant was indebted to the plaintiff for the balance of the Turner unpaid account, with interest. Judgment for recovery of this amount, with costs of action, was entered against the defendant *Hickcox.*

Herbert R. Manger of Milwaukee, for the appellant.

For the respondent there was a brief by *Wm. F. Schanen* and *Chas. J. Kunny* of Port Washington, and oral argument by *Mr. Schanen.*

SIEBECKER, J. The defendant claims that the writing in question is in its terms a guaranty of collection. The words, "I will guarantee your account with Fred Turner up to $250," clearly indicate that the signer of the instrument intended to make himself responsible for the obligations Turner would incur in running an account for the purchase of goods from the creamery, and the plaintiff so understood it and extended credit to Turner accordingly. *Hickcox's* subsequent treatment of the writing accords with the idea that it is a guaranty of payment. The next clause of the writing, to the effect that settlements of the account were to be made "on the first and fifteenth of each month," shows that the guaranty was to secure payment of any unpaid part of the Turner account up to the amount of $250, regardless of previous semi-monthly payments during the time credit was extended. The phraseology imports an undertaking by the defendant to pay Turner's continuing liability under successive transactions on account, and is not limited as to time or to any specific account, and when accepted is operative until revoked.

It is earnestly contended that the court erred in holding that the guaranty became obligatory on the defendant. The court declared that, "although there was no formal acceptance and notice thereof given to *Hickcox,* it is apparent that the parties dealt with each other as if formal notice had been given." This finding, if supported in the evidence, is in effect one that there was a mutual assent of the plaintiff and defendant to this contract and that the credit in question was extended to Turner in reliance thereon. Can it be said that the defendant had actual notice of the plaintiff's acceptance of the guaranty within a reasonable time after the plaintiff's acceptance thereof? The evidence shows that the plaintiff insisted on a settlement of Turner's account in accordance with the terms of the guaranty on the 15th of August and

that it received payment of the amount then due on account in the form of a check payable to the plaintiff and having the defendant's name as signer. The plaintiff's officers and agents testify to having received payment of this check. It also appears that Turner brought this check and delivered it to the plaintiff. These facts appear by evidence other than the entries in the exchange register of the Thiensville bank, in which were listed out-of-town checks, which was improperly received as evidence and cannot be considered in the case. It also appears that when the second payment on the account became due on the last day of August and Turner failed to pay it the defendant immediately notified the plaintiff, "I hereby beg to withdraw the guaranty I made for the account of the Farm Products Company or Fred Turner," which, as the trial court considered, tends to show that the defendant understood that the plaintiff had accepted the guaranty. This is also corroborated by the defendant's conduct when the plaintiff's agents finally demanded settlement of the balance due them on Turner's account and by the other facts and circumstances of the transactions of the parties disclosed by the evidence. In the light of this state of the evidence, the defendant's claim that his denial of having signed and issued any check such as the plaintiff asserts was delivered to it by Turner must be accepted as conclusive that he issued no such check, cannot be acceded to. We think that the trial court was not bound by such denial in the light of the evidence tending to show that the sum of $197 was paid to the plaintiff on the defendant's check. It is considered that the trial court's finding of fact that the defendant had notice of acceptance of guaranty by the plaintiff is sustained by the evidence. There is no reversible error in the record.

By the Court.—The judgment is affirmed.

TOWN OF HUMBOLDT, Respondent, vs. SCHOEN, imp., Appellant.

April 26—May 15, 1917.

Drains: Towns: Unlawful expenditure of money: Recovery: Pleading.

1. A resolution adopted by the electors at an annual town meeting providing that the town be brought under the county and state drainage system and that the town board should lay out the different districts and fix the number thereof, was not a proceeding had under ch. 54, Stats. 1915, relating to town drains.
2. Except as otherwise provided by statute for specific drains, such as for highways under sec. 1236, Stats. 1915, the only authority given to a town to provide or pay for a drainage system is that given by ch. 54. Sec. 776 does not give such authority or contemplate the expenditure of town money for a drainage system.
3. The words "other charges and expenses of the town" in sub. (1), sec. 776, Stats., mean only other *lawful* charges and expenses.
4. When facts showing an unlawful expenditure of the town's money are pleaded, damage is sufficiently made to appear.

APPEAL from an order of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed.*

Action to recover moneys claimed to have been illegally paid out of plaintiff's treasury by the defendants, who were officers of the plaintiff town. After stating the corporate character of plaintiff the complaint alleges:

"2. That at the times hereinafter mentioned the defendants *Louis Schoen,* Eugene Panure, and John Pigeon were the duly elected, qualified, and acting supervisors of the said town of *Humboldt,* and that at the said times the defendants Fred Clabots and Joseph Baumgart were the duly elected, qualified, and acting clerk and treasurer, respectively, of said town.

"3. That at the annual town meeting of said town held April 6, 1915, the following resolution was introduced and adopted by the electors thereof, to wit: 'Motion made and seconded that the town of *Humboldt* be brought under and is hereby brought under the county and state drainage system; and be it further resolved that the town board of super-

visors of said town shall lay out the different districts and fix the number of districts in said town at their first meeting after this day. Dated this 6th day of April, A. D. 1915. Signed, Jacob Kaster. Adopted.'

"4. That no further proceedings in the way of raising money to carry out the purpose of said resolution or otherwise relating to said matter were had at said meeting or at any meeting of said town, except as mentioned hereinafter.

"5. That thereafter, and without any lawful authority or proceedings other than mentioned above, and without any lawful authority so to do, said town board entered into a pretended contract with the Steller Engineering Company to survey and lay out the lines for a proposed system of drainage ditches in said town and employed workmen to assist in doing said work.

"6. That said Steller Engineering Company and others so employed then proceeded to survey and run lines for an extensive system of drainage ditches in said town, and that said defendant *Louis Schoen* pretended to perform work and labor with the said surveyors.

"7. That thereafter, and on the dates mentioned hereafter, town orders were issued by said town board payable to said Steller Engineering Company and other persons so employed in payment for said services in making such survey, as follows, to wit: [Here follows a list of orders aggregating $1,214.]

"8. That said orders were duly countersigned by said defendant Fred Clabots as town clerk, he, the said Fred Clabots, then and there well knowing that there were no funds in the town treasury which could lawfully be used to pay said orders, and well knowing all the facts heretofore alleged.

"9. That said orders were paid by said defendant Joseph Baumgart, as town treasurer, out of funds of said town which had been raised for general town purposes and for highway purposes, he, the said Joseph Baumgart, then and there well knowing that there were no funds in said town treasury which could lawfully be used to pay said orders, and well knowing all the facts heretofore alleged."

Then follow allegations showing demand upon the defend-

ants for the repayment of the money and their refusal so to do and that plaintiff has the authority to bring the action.

To this complaint the defendant *Louis Schoen* interposed a general demurrer, which was overruled, and from an order entered accordingly he appealed.

The cause was submitted for the appellant on the briefs of *Sheridan, Evans & Merrill,* and for the respondent on that of *M. E. Davis* and *Minahan & Minahan,* all of Green Bay.

VINJE, J. It is quite evident that the resolution of the electors of the town providing that it should be brought under the county and state drainage system, and that the town board should lay out the different districts and fix the number thereof, was not a proceeding had under ch. 54 of the Statutes of 1915, relating to town drains. But counsel for defendant contend that the procedure authorized by said chapter is merely cumulative and that the electors had the power, under the provisions of sec. 776, Stats. 1915, to provide for a drainage system and expend money therefor. The language of the section relied upon is as follows: "To vote to raise money for the repair and building of roads or bridges, or either; for the support of the poor and defraying all other charges and expenses of the town." Sub. (1). Counsel is mistaken in the view that ch. 54 gives a cumulative procedure. It is the exclusive way in which a system of town drains may lawfully be adopted. Except as otherwise provided by statute for specific drains, such as for highways under sec. 1236, Stats. 1915, the only authority given a town to provide or pay for a drainage system is that given by ch. 54. Neither does sec. 776 contemplate the expenditure of town money for a drainage system. If the phrase "and defraying all other charges and expenses of the town" included that of a drainage system, then it might be held to include the expense of any other work or scheme which the officers of

the town might undertake. The phrase must be limited to mean only other lawful charges and expenses of the town.

Claim is also made that the pleader does not allege that the resolution was not in conformity with the provisions of ch. 54. The complaint alleges that the board, "without any lawful authority so to do," entered into the pretended contracts for the work for which the money was paid. Besides, the court will take judicial notice of the contents of ch. 54. The contention that no facts showing damage are alleged is equally without merit. When facts showing an unlawful expenditure of the town's money are pleaded, damage is sufficiently made to appear. *Milwaukee v. Binner,* 158 Wis. 529, 149 N. W. 211.

By the Court.—Order affirmed.

LUEKE, Respondent, vs. SENN, Appellant.

April 26—May 15, 1917.

Pleading: Joinder of causes of action: Negligence and gross negligence: Malpractice by physician.

1. A cause of action based upon the same facts may be pleaded in the same complaint, first as creating a liability for ordinary negligence, and second as creating a liability for gross negligence, depending upon the inferences to be drawn from the facts.
2. In an action against a physician for malpractice a complaint stating, as a first cause of action, facts sufficient to show ordinary negligence, and, as a second cause of action, stating the same facts and that defendant "wantonly and wilfully misrepresented to her [plaintiff] and falsified to her" in regard to his ability and her condition, is *held* to state but one cause of action, the facts alleged in the so-called second cause of action not being sufficient to show a liability for gross negligence.

APPEAL from an order of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Modified and affirmed.*

Malpractice. Demurrer. Briefly the complaint shows the following facts: That the defendant is a licensed physician and surgeon and that on the 9th day of July, 1913, he was called in consultation with a physician who had previously attended the plaintiff during childbirth; that at the solicitation of the defendant the plaintiff discharged her physician and employed defendant; that he represented himself to her as a very skilful man of remarkable ability in his profession; that following her confinement she had suffered from blood poisoning; that the defendant performed an operation known as curettement; that she had trouble with her left leg and foot; that at the direction of the defendant the leg was elevated; that when she recovered from her blood poisoning she found her leg was stiff and could not be moved, in which condition it continued until the 25th of May, 1914, when at the direction of the defendant she was taken to a hospital, anæsthetised, and her leg broken at the knee so as to straighten it; that the defendant represented himself to be a man of great skill, fully competent to perform such operation; that following the breaking of the leg it became discolored and intensely painful; that the defendant continued to assure her that she was getting along finely and that she would soon recover; that such condition continued until the big toe of her left foot dropped off and her leg became shriveled and wasted; and that on the 26th of September, 1914, plaintiff called in other physicians and in order to save her life amputation of the leg was necessary. The complaint then continues:

"Plaintiff alleges further that the defendant negligently permitted said knee to become stiff and in the position in which it was by permitting it to remain in a raised condition and by supporting it in such condition. That said defendant negligently broke such knee and negligently failed to discover that in breaking such knee the blood supply below the knee had been cut off, and that such defendant negligently

reported to this plaintiff that she was recovering, doing finely, and getting well.

"Plaintiff alleges further that solely through the negligence and wanton misconduct of the said defendant she has suffered the loss of her left limb, to her damage in the sum of twenty-five thousand dollars."

As a second cause of action the plaintiff alleges

"that in making the representations to her set forth in the first cause of action, concerning his ability and proficiency and in regard to her condition, that the said defendant wantonly and wilfully misrepresented to her and falsified to her in such regard and particularly in regard to the fact that she was improving, whereas she was not, and that through and by reason of such wilful and wanton misstatements the plaintiff continued under the care of the defendant, and that by reason of such continuance she was required to finally have her left limb amputated above the knee, all to her damage in the sum of twenty-five thousand dollars."

To the complaint the defendant interposed a demurrer as follows:

"First cause of action.

"1. That there is another action pending between the same parties for the same cause, to wit: the second cause of action set forth in plaintiff's complaint.

"2. That several causes of action have been improperly united.

"3. That it does not state facts sufficient to constitute a cause of action.

"Second cause of action.

"1. Upon the ground that it does not state facts sufficient to constitute a cause of action."

The trial court overruled the demurrer and the defendant appeals.

The cause was submitted for the appellant on the brief of *Lines, Spooner, Ellis & Quarles* of Milwaukee and *Greene, Fairchild, North, Parker & McGillan* of Green Bay, and for the respondent on that of *Minahan & Minahan* of Green Bay.

ROSENBERRY, J. The trial court was of the opinion that the pleader intended to plead ordinary negligence in the first cause of action and gross negligence in the second cause of action; that two good causes of action were stated, one for ordinary negligence and one for gross negligence, and that for that reason there was no improper joinder, and wholly overruled the demurrer.

That a cause of action based upon the same facts may be pleaded in the same complaint, first as creating a liability for ordinary negligence, and second as creating a liability for gross negligence, depending upon the inferences to be drawn from the facts, is clear from *Astin v. C., M. & St. P. R. Co.* 143 Wis. 477, 128 N.W. 265. We are further of the opinion that that part of the complaint denominated first cause of action states facts sufficient to constitute a cause of action for that kind of negligence commonly denominated malpractice. We are of the opinion that the facts stated in that part of the complaint denominated second cause of action are not sufficient to constitute a cause of action showing liability for gross negligence and that therefore but one cause of action is stated in the complaint. The only difference between the two causes of action attempted to be set forth in the complaint is that in the second the defendant is said to have "wantonly and wilfully misrepresented to her and falsified to her in such regard," etc. No additional fact or inference is stated. Calling a thing names does not change its character or composition, add to, or detract from it. The demurrer, therefore, should have been overruled as to the first cause of action and sustained as to the second cause of action, and the order of the trial court should be modified accordingly.

By the Court.—The order appealed from is modified as stated in the opinion, and as so modified is affirmed, with no costs to either party except that respondent is to pay clerk's fees in this court.

GREEN BAY FISH COMPANY, Respondent, vs. JORGENSEN, Appellant.

SAME, Appellant, vs. SAME, Respondent.

April 26—May 15, 1917.

Master and servant: Discharge of servant: Justification: Corporations: Conversion of moneys by treasurer: Authority of president to bring suit.

1. **A wilful conversion of corporate funds to his own use by the treasurer of a corporation who was also employed as its manager justified his discharge as a matter of law, especially where such misappropriation of the funds was contrary to the express direction of the president of the corporation. *Schumaker v. Heinemann*, 99 Wis. 251, distinguished.**
2. **The president of a corporation, who by the charter or by-laws is given control of every department of the company, has implied authority to commence an action in its name to recover moneys of the corporation which have been converted by its treasurer and manager to his own use.**

APPEALS from a judgment of the municipal court of Brown county: CARLTON MERRILL, Acting Judge. *Modified on plaintiff's appeal; defendant takes nothing on his appeal.*

The appeal by plaintiff is from so much of a judgment of the municipal court as gives plaintiff less damages than it claims, by defendant from the judgment denying him relief.

The defendant was one of the original stockholders and directors of the plaintiff, a Wisconsin corporation organized in May, 1914. The defendant and one John Ketter, also a stockholder and director, both lived in Green Bay before and after the incorporation, and defendant as treasurer and manager of the company, and John Ketter as director and assistant manager, conducted the affairs of the company at its place of business in Green Bay. *Jorgensen* as such treasurer had authority to draw checks upon the company's account kept at Green Bay. The remaining stockholders, Benjamin Sachs and Meyer N. Finder, both of Chicago, Illinois, were directors and the said Sachs president of the company.

By the by-laws of the plaintiff the following were described as the duties of the president:

"The management of every department of the company shall be under his control. The several officers of the company shall be responsible to him for the proper and faithful discharge of their several duties and shall make such reports to him, touching the business of the company under their charge, as he may from time to time require."

At about the time of the incorporation *Jorgensen,* who had had many years' practical experience in the fish business, was by resolution of the board of directors employed under a written contract, to be executed by the company, as manager for five years from April, 1914, at a salary of $50 per week, and John Ketter, by a similar resolution, was employed as assistant manager for five years at $35 per week. The stock was equally divided between the Chicago and the Green Bay stockholders as follows: Sachs and Finder each fifteen shares, *Jorgensen* twenty shares, and Ketter ten shares, of a par value of $100 each.

At the time of the organization neither *Jorgensen* nor Ketter had sufficient cash to pay for all of their subscriptions. By the common understanding they were permitted to make payments thereon from time to time. At about the time of the organization it was proposed by the four to make a written agreement which in substance provided that the stock of all should be deposited with the Chicago Title & Trust Company of Chicago so that in case of differences arising between the parties such Title & Trust Company, its president, or some person selected by it, should act as arbiter between the parties or carry on the business. This agreement was signed by *Jorgensen* and Ketter, but never by Sachs and Finder. *Jorgensen,* however, knew of this failure on their part to sign at least a year before his discharge. The corporation from the beginning borrowed about $40,000 from the company in which Sachs was interested in Chicago and used the same in

the construction of buildings and the conduct of the business, and also owed about $10,000 to the bank at Green Bay for loans, together with other accounts, and was in May, 1916, with less assets than liabilities. The corporation continued with varying business success until the spring of 1916. In May, 1916, the president, Sachs, learned of substantial overdrafts by *Jorgensen,* among others a check to pay his life insurance premium of $30.50, another for his personal use of $40, and a third to pay his taxes of $186.68, all drawn in April, and finally that he drew out practically all the cash on hand, and, as found by the court, converted the same to his own use to an amount of $1,601.97 by a check on May 8th, and thereupon Sachs discharged defendant.

From defendant's own testimony it appears that at the time this money was drawn out he knew that the corporation was practically insolvent and owed large sums of money that it had borrowed, that he had no authority to withdraw the sum, and that it was without the consent of the president and over his specific objection to any such overdraft. It also appeared that *Jorgensen* had permitted Ketter to overdraw his account so that at this time Ketter's overdraft practically equaled the amount he had theretofore paid for his stock, namely, $1,000. Ketter thereupon resigned and surrendered his stock.

The defendant claimed that he was authorized to withdraw this money for the purpose of protecting what he thought were his rights against the plaintiff in the belief that the $2,000 worth of stock to which he subscribed had not been issued to him and was withheld and that the Chicago directors had not treated him fairly in that the contract with reference to the depositing of the stock in escrow with the Chicago Title & Trust Company of Chicago had not been signed by them or its provisions carried out. Although the jury found to the contrary, yet the defendant admitted on the trial that before the commencement of the action demand

had been made upon him for the return of the money and that he had refused to do so.

The plaintiff sued defendant, *Jorgensen,* alleging the conversion of the $1,601.97. The defendant counterclaimed for $2,000 which he claimed was due him because he had paid for the stock and had not received the same; also for $5,000 damages on the claim that his contract of five years from May, 1914, had been terminated by the plaintiff without cause and that he was entitled to damages therefor. Defendant withdrew his counterclaim for the $2,000, it appearing upon the trial that the stock had been sent him and sent back by him to Chicago.

By a special verdict it was found substantially as follows: First, as answered by the court, that the defendant on May 8, 1916, took into his possession $1,601.97 of money, the property of the plaintiff, and converted the same to his own use before the commencement of the action. That before it discharged the defendant the plaintiff demanded that he return this sum; and by a further answer that the defendant did not refuse to return this money; by the fourth question that the defendant as general manager and employee breached his duty as such to the plaintiff; and then by the fifth question that such breach did not constitute justifiable grounds for his discharge. By the sixth question the jury found that the defendant's damages by reason of such discharge were $2,500. This answer was modified by the court, under his view of the rule of damages, to the sum of $850. The jury by the seventh question found that the bringing of the action by the president was not ratified by the plaintiff corporation. This answer was changed by the court to the affirmative.

After motions by the respective parties the court rendered judgment upon the corrected verdict for the difference between $1,601.97 with interest from May 8, 1916, and the sum of $850, the amount that was the agreed wage from the date of the discharge to the time of trial, making $792.82 as

plaintiff's damages and costs and disbursements. The plaintiff appeals, claiming that it should have judgment for the entire amount found by the court to have been converted by the defendant. The defendant appeals, claiming that he should have allowed the $2,500 damages found for him by the jury; and also that the court was not justified in finding that the action had been properly started on behalf of the plaintiff corporation.

For the plaintiff there were briefs by *Kittell, Jaseph & Redfield* of Green Bay, and oral argument by *John A. Kittell.*

For the defendant there were briefs by *Martin, Martin & Martin* and *Sheridan, Evans & Merrill,* all of Green Bay, and oral argument by *William L. Evans.*

ESCHWEILER, J. The important question here is whether or not the court below should have permitted the jury's finding that the conduct of defendant was not sufficient to warrant his discharge to control in the determination of this case.

We think that under the facts herein as stated the court should have held as a matter of law that the discharge of defendant was justified because he breached his duty. The facts here much more than meet the requirements laid down in the case of *Green v. Somers,* 163 Wis. 96, 157 N. W. 529, namely, that where there is wilful and contumacious refusal by the servant to obey the lawful and reasonable commands of the master there is a breach of duty justifying the discharge. This case of *Green v. Somers* evidently was not called to the attention of the trial court in disposing of this matter, and in his decision he laid much weight upon the case of *Schumaker v. Heinemann,* 99 Wis. 251, 74 N. W. 785, as requiring a jury's determination upon the question of whether or not such conduct justified a discharge. This earlier case does not meet or control the situation here.

The defendant as treasurer and director had control of the

funds of the corporation for its benefit and in trust for it, not for himself or any other officer or employee. As between defendant and plaintiff the funds were impressed with a trust which he could not evade or avoid. *Boyd v. Mut. F. Asso.* 116 Wis. 155, 172, 90 N. W. 1086, 94 N. W. 171; *Saranac & L. P. R. Co. v. Arnold,* 167 N. Y. 368, 60 N. E. 647; *Smith v. Baker,* 101 Mich. 155, 59 N. W. 394; *Miller v. Jones* (Iowa) 159 N. W. 671.

It requires no lengthy dissertation to demonstrate as a legal and ethical proposition that where, as here, upon the undisputed facts and the verdict of the jury it appears that an officer or servant, against the express direction of his superior officer or master, converts to his own use funds of the master, he has so breached the duties that he owes to his employer that his discharge is justified. Even were the element of express direction to abstain from such use of corporate funds lacking, still a wilful conversion by a servant of his master's funds would justify his discharge.

The court below, therefore, should have granted plaintiff's motion at the close of the trial for judgment in its favor for the amount shown to have been converted by defendant, that is, the $1,601.97. This would of necessity dismiss the defendant's counterclaim for any alleged breach of contract by such discharge.

There is no need that express authority to commence such an action should be given by the board of directors to a president who is clothed by the charter or by-laws of the corporation with the management of every department of the company. Such authority may well be implied in the president of a corporation, especially under the circumstances of this case, where one who is a director and treasurer of the company must be sued and that one other of the four directors had himself overdrawn his account and had resigned as such director, as Ketter did. It would be an idle formality to insist that the board of directors should be convened to do by

formal resolution that which would be and ought to be so evidently within the power of the head of such a corporation. 2 Thomp. Corp. (2d ed.) § 1433; *Trustees of Smith Charities v. Connolly,* 157 Mass. 272, 31 N. E. 1058; 10 Cyc. 904. Where, as here, such proceedings by the president were subsequently ratified at a meeting of the board of directors, the right to conduct and carry on such a suit by the direction of the president is beyond all question.

By the Court.—On plaintiff's appeal the judgment is modified by awarding plaintiff the sum of $1,601.97, together with interest from May 8, 1916, together with its costs and disbursements. Defendant takes nothing by his appeal.

DUPONT, Administrator, and others, Appellants, vs. JONET, Administrator, and others, Respondents.

April 26—May 15, 1917.

Trusts in personal property: Creation by parol: Evidence: Husband and wife: Gift of note and mortgage: Certificate of deposit: Tenancy by entireties: Right of survivorship.

1. A trust in personal property may be created by parol, but the evidence to establish it must be clear and convincing and must consist of something more than loose conversations with third parties.
2. Thus, in an action by the administrator of a husband's estate against the administrator of the wife's estate, to recover certain securities which originally belonged to the husband and were alleged to have been transferred to the wife under a trust agreement by which she was to have the use of such securities during her life and upon her death to give them to his children by a former marriage, evidence of statements said to have been made by the wife in casual conversations with her friends was too vague to establish the making of any such agreement or the creation of any trust.
3. Under sec. 2405*m*, Stats., the supreme court may grant relief to an appellant if it appears that the real controversy has not been

fully tried or if it seems probable that justice has miscarried, though the issue raised in that court was not raised by the pleadings or otherwise in the court below and there was no ruling or exception which brings the question before the supreme court.

4. Where a note and mortgage securing a loan made by a husband were made out in the name of his wife at his direction and were kept in a box at their home, accessible to both, and the mortgagor afterwards paid the interest to the wife and took her receipt therefor, these facts establish a completed gift to the wife, her knowledge, acceptance, and possession of the securities being clearly shown. *Tobin v. Tobin*, 139 Wis. 494, distinguished.

5. Husband and wife went to a bank together, where he surrendered certificates of deposit which were in his name and had new certificates made out in his and her names jointly, payable to either. They received such certificates, took them home, and kept them until his death in a box accessible to both or either at any time. *Held*, that there was a completed gift to the wife of an undivided interest in the fund; that a tenancy by entireties was created; and that upon the husband's death the wife took the whole by right of survivorship.

ESCHWEILER and KERWIN, JJ., dissent.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed.*

Action in equity, originally brought by the administrator of the estate of a deceased husband against the administrator of the estate of his deceased wife demanding judgment that certain securities be declared to be the property of the plaintiff administrator and that the defendant administrator be adjudged to hold the same in trust for the plaintiff administrator. In the original complaint it was charged that the wife had procured the deceased husband to transfer the securities to her by undue influence and by taking advantage of his mental and physical weakness. Upon the trial an amendment to the complaint was allowed charging that the wife, "before she obtained the property," agreed that after using the same during her life she would at her death give the property to the children of her husband by a former marriage, and that by reason of such promise and undue influence "she re-

ceived a transfer of said property." The allegations of undue influence and the agreement to hold in trust were denied by the defendants and the action was tried by the court without a jury upon the sole question whether the alleged agreement to hold the property in trust was made, the contention of undue influence having been abandoned on the trial. At some time during the trial the husband's children by the former marriage were made parties plaintiff by stipulation.

The following facts were disclosed by the evidence: Leopold DeBeck, the plaintiff's intestate, a widower seventy-five years of age and the father of seven adult children, married in July, 1911, Louisa Klick, a divorced woman, considerably younger than himself, who had been his housekeeper for two years and to whom he had furnished the funds to secure a divorce. In June preceding the marriage Mr. DeBeck deeded the small homestead which he owned to a third person and the same was at once deeded back to Leopold DeBeck and Louisa Klick and to the survivor of them. After the marriage Louisa received $300 from the estate of her father. In April, 1912, $875 was loaned by Leopold to one *Frere* and by Leopold's direction the note and mortgage was made payable to Louisa. Subsequent to his marriage DeBeck had on deposit in a bank $1,300, evidenced by two certificates of deposit, one for $300 falling due December 31, 1913, and the other for $1,000 falling due April 8, 1914. Both were renewed when they fell due, and on each occasion the husband and wife went to the bank together and procured a new certificate to be issued reading "Mr. and Mrs. Leopold DeBeck has deposited" (stating the sum), payable "to the order of either." In the $1,000 certificate the words "or survivor" were added, but they do not appear in the $300 certificate. The physical possession of the certificates after their renewal is not shown by the evidence, but the statement was made by one of the counsel on the argument of the case in this court that they were kept with the mortgage in a box at home, sub-

ject to the control of either party, and this statement was assented to by opposing counsel. The *Frere* mortgage and the two certificates are the only property involved in this action. The marriage was happy. The husband's children were displeased with it and seldom visited the old couple. On the night of December 22, 1914, both husband and wife were asphyxiated by gas from a coal stove in their home and Leopold DeBeck died December 23d, while Louisa survived until the following day. Neither made a will. The circuit judge reviewed the testimony at length and found that no agreement was made by Mrs. DeBeck, when the transfers were made, to hold the property in trust for the children, that no trust was in fact created, and that Louisa DeBeck at the time of her death was legally possessed of the property in controversy, and that the defendant administrator is entitled to possession thereof. From judgment in accordance with these findings the plaintiffs appeal.

For the appellants there were briefs by *Kaftan & Reynolds* of Green Bay, and oral argument by *Robert A. Kaftan.*

For the respondents there was a brief by *Silverwood & Fontaine* of Green Bay, and oral argument by *A. B. Fontaine* and *T. P. Silverwood.*

WINSLOW, C. J. It is very plain that there was presented to the trial court here but one simple issue and that was whether the deceased Louisa, at the time she received the property in question, made a promise or contract that she would use it during her life and upon her death give it to her husband's children. The fact that a complete transfer of the property to her had been made was not questioned; in fact it was explicitly asserted in the complaint (as amended) that "she obtained the property" by reason of having made such a promise. This issue the court below tried with painstaking care. The proof of the trust agreement consisted of oral statements said to have been made by Louisa in casual con-

versations with her friends. The court reached the conclusion that this evidence was too vague to show that any contract or promise was made by Louisa at the time of the transfers and that the statements relied on amounted at most to mere promises, made after the transfers, that she would at some time give the property to her husband's children.

A trust may unquestionably be created in personal property by parol, but the rule is that the evidence to establish it must be clear and convincing and must consist of something more than loose conversations with third parties. Any other rule would be fraught with danger. *Dewey v. Fleischer,* 129 Wis. 591, 109 N. W. 525; *Allen v. Withrow,* 110 U. S. 119, 3 Sup. Ct. 517. Bearing this rule in mind, we are well convinced that the conclusions of the trial court were right.

Ordinarily the case would end here, but appellants' counsel seek to raise in this court an issue not raised in the trial court and base their contention in this court chiefly thereon. They say that there is no proof showing that either of the securities in question was ever delivered to the wife and hence there was never any completed gift. There was, as we have seen, no such issue raised by the pleadings; in fact the complaint alleges affirmatively that the property was "transferred" and that it was "obtained" by Louisa by means of her promise to hold it in trust. There is therefore no ruling or exception which brings the question before us. This court has power, however, under sec. 2405*m,* Stats., to give the appellant relief in such a case, if it appear that the real controversy has not been fully tried or if it seems probable that justice has miscarried.

Does such appear to be the case here?

We think not. In considering this question we may of course take into account the statement of counsel made in this court and assented to by opposing counsel that the securities were kept in a box at home, accessible to both husband and wife.

So far as the note and mortgage are concerned, there can be no doubt that under the circumstances disclosed by the evidence, taken in connection with the facts admitted by counsel, there was a completed gift. They were made out in the name of the wife at the husband's direction and were kept at the home of the parties. It is stated by the circuit judge, in his very careful review of the testimony, that when the mortgagor paid his interest at the end of the first year he paid it to Louisa DeBeck and took her receipt therefor. This shows knowledge, acceptance, and possession on the part of the wife and makes it certain that the gift was fully completed. The case of *Tobin v. Tobin,* 139 Wis. 494, 121 N. W. 144, in which it was held that there was no completed gift of a note and mortgage executed in like manner because the donee never knew of their execution and never accepted or had possession of them, plainly has no application here.

As to the certificates of deposit the question is different, but we reach the same conclusion.

There may be a joint tenancy in personalty as well as in realty and the characteristic unities are the same, namely, unity of time, title, interest, and possession, and in both cases there is the right of survivorship. *Farr v. Trustees, etc.* 83 Wis. 446, 53 N. W. 738; *Fiedler v. Howard,* 99 Wis. 388, 75 N. W. 163. When the grantees are husband and wife they become (at common law) tenants by entireties instead of joint tenants. Some of the text-books consider an estate by entirety as only a species of joint estate, but it is unnecessary to delve into the well-nigh forgotten lore on this subject. Both estates possess a number of the same essential qualities, including the quality of survivorship. As to real estate, our statute has substituted joint tenancy for tenancy by entireties in case of a conveyance to husband and wife, but there has been no such change as to personal property. *Wallace v. St. John,* 119 Wis. 585, 97 N. W. 197; *Bassler v. Rewodlinski,* 130 Wis. 26, 109 N. W. 1032.

No reason is perceived why a husband may not deposit money in a bank and take a certificate therefor in the names of both himself and his wife, payable to either, and thus make a gift to her of an undivided interest in the fund, and create a tenancy by entireties therein. All that is necessary would seem to be that the gift be completed by transfer of the required possession of the thing given. Inasmuch as the thing given is a joint interest, it is only logical that the possession given should be a joint possession. Such a possession is appropriate to and characteristic of joint ownership, just as individual possession is appropriate to and characteristic of individual ownership.

It is admitted that the possession of the certificates after their delivery was joint; that is, they were kept in a box at the home of the parties where they were accessible to both or either at any time. This, in our judgment, makes the gift complete.

There are indeed authorities which go further than this. It is said by Mr. Freeman (Cotenancy & Part. (2d ed.) § 68):

"Whenever a husband procures stocks in the name of himself and wife, or takes notes, mortgages, or other securities in his and her names, a tenancy by entirety is created in such stocks, notes, mortgages, or other securities. . . . Had he desired to be sole owner, he would have used no name other than his own. But having had her name inserted with his own, she, in the event of his death, becomes sole owner of all which the two at the moment of his decease possessed as tenants by the entirety."

See, in support of these views, *Sparks v. Hurley,* 208 Pa. St. 166, 57 Atl. 364; *Fisk v. Cushman,* 6 Cush. (60 Mass.) 20; *Draper v. Jackson,* 16 Mass. 486.

There are doubtless many certificates of deposit which are made payable to either of two persons for the very purpose of endowing the survivor with the whole title in case of the death

of one. Our banking statute recognizes this custom, and, so far as deposits under $500 are concerned, makes the payment thereof to either party and his receipt therefor an absolute discharge of liability by the bank, whether the payment be made before or after the death of the other party. Sec. 2024—46*m*, Stats. 1915. Many authorities are cited by appellants to the effect that a deposit of money by one person in a bank on a pass-book or certificate of deposit in his own name and that of another jointly is not a completed gift of any part of the money so deposited so long as the depositor retains entire control of the pass-book or certificate of deposit. They will be found cited in the notes in 20 Cyc. 1204, 1205. This may be at once admitted. In the present case it affirmatively appears that husband and wife went to the bank together; that the previous certificate was surrendered, and by direction of the husband a new certificate issued reciting that "Mr. and Mrs. Leopold DeBeck" had deposited the sum named in the former certificate payable to the order of either; that the husband stated that he was now married, introduced the woman as his wife, and explained this was the reason why he wanted the certificates so made out; that they received the certificates and went away together; that the certificates were taken home and kept in a box where they were accessible to each and so kept until the death of Mr. DeBeck.

We have no hesitation in pronouncing this a valid gift completed by a sufficient delivery. Creditors of the husband might doubtless defeat it by showing that they would thereby lose their claims, but there is no such question here.

By the Court.—Judgment affirmed.

ESCHWEILER, J. (*dissenting*). Although by the first conclusion of law the trial court found that at the time of her death Louisa DeBeck was legally possessed of the certificates of deposit and that the defendant administrator of her estate

is now entitled to the possession thereof, yet the real and only question litigated was whether there was a trust created in them for Leopold DeBeck's children.

The facts shown on the trial are sufficient to raise a very serious doubt whether there had been such a loss of control by Leopold DeBeck of these certificates as to vest absolute title in his widow. The mere forms of the certificates would not be sufficient of themselves. *Tobin v. Tobin,* 139 Wis. 494, 121 N. W. 144; *Staples v. Berry,* 110 Me. 32, 85 Atl. 303; *Matter of Van Alstyne,* 207 N. Y. 298, 100 N. E. 802; *Taylor v. Henry.* 48 Md. 550, 30 Am. Rep. 486; *Whalen v. Milholland,* 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208.

The complaint by the administrator does go upon the theory of a completed delivery and passing of possession to Louisa DeBeck. But if such theory was mistaken, or ill-advised even, I do not think a person suing in a representative capacity should be held to any such rigid rule as would foreclose him from asking to have this new and important issue determined. Neither ought the plaintiff children of Leopold DeBeck be bound by a position taken by an administrator in an action before they became parties thereto. It appears to me that this is a case for relief under sec. 2405*m,* Stats., providing that if it shall appear that the real controversy has not been fully determined, or that it is probable that justice has for any reason miscarried, this court in its discretion may remit the case for a new trial below and direct the making of such amendments in the pleadings as shall be deemed necessary to accomplish the ends of justice. If there was not sufficient done by Leopold DeBeck during his lifetime to vest absolute title in Louisa DeBeck, then the defendant admintrator is being given by the court property which in truth and in fact belongs to someone else. I think that this has now become a vital question in the case and the parties interested should have their day in court thereon.

KERWIN, J. I concur in the foregoing dissent.

HEINS, Respondent, vs. THOMPSON & FLIETH LUMBER COMPANY and others, Appellants.

April 26—May 15, 1917.

Appeal: Exceptions: Filing: Bill of exceptions: Vendor and purchaser of land: Contracts: Validity: Signature by agent: Statute of frauds: Specific performance: Breach by vendee: Payment, how enforced.

1. Exceptions to the trial court's findings were not filed until after the time limited by sec. 2870, Stats.; but a copy thereof marked "duplicate" is in the bill of exceptions and the trial court certified that the bill contained "the exceptions filed to the findings." *Held*, that such exceptions must be deemed to have been filed by leave under sec. 2831, Stats., and that they are sufficiently incorporated in the bill of exceptions.
2. In an action by the vendor to enforce specific performance of alleged contracts for the purchase of land, the evidence is *held* to show that certain defendants dealt with plaintiff in the matter not in their individual capacities but on behalf of the defendant corporation, of which they were officers, and that the contracts were not made with them as purchasers but with said corporation.
3. A contract for the sale of land which clearly appears from several writings considered together satisfies the statute of frauds and may be specifically enforced.
4. The signing of such a contract in the name of the vendor by his authorized agent is sufficient under sec. 2304, Stats.
5. Where, upon accepting an offer for the sale of lands at a certain price, the purchaser directs the vendor to send on formal contracts and abstracts of title, and after receiving such papers retains them for months without objection and also makes a payment thereon, this is such an acceptance and adoption of the contracts as gives them validity although they are signed only by the vendor; and such acceptance and assent to the terms of the contracts also supplies any previous want of a specific agreement as to the terms of payment for the land.
6. Where parties competent to contract have made an agreement for the purchase and sale of lands which is reasonably certain in all its parts and not objectionable for unfairness or inequity, the specific performance thereof is a matter of right and not of judicial discretion.
7. Where the vendee in a land contract would have a right to compel specific performance, the vendor has a like right.
8. The vendor's right to enforce payment of the purchase money under a land contract should, as a general rule, be enforced by

sale of the land to satisfy his claim, with a judgment for the deficiency, if any, enforceable by execution, or by a resort to the remedy of strict foreclosure; and unless there are special circumstances showing that such remedies will not fully protect the vendor's right, the court should not render judgment in such form that payment by the vendee might be enforced by a contempt proceeding.

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Reversed, except as to one defendant; modified as to that one.*

Action for specific performance of eight alleged contracts for purchase of land.

The complaint was to this effect: In April, 1913, F. J. Stevenson, as agent for plaintiff, the holder of the legal title to the lands in question (describing the same, consisting of a one-half section) with power to sell the same, negotiated with defendants *Thompson & Flieth Lumber Company, W. H. Flieth,* and *H. G. Flieth,* for the sale thereof to them for $17 per acre, $1 per acre to be paid the first year and the balance in five annual payments with interest at six per cent. per annum, resulting in a written agreement that they should purchase said lands of plaintiff upon such price and terms. Accordingly, plaintiff sent defendants eight contracts duly executed by said agent in duplicate, each set being for one forty, and, at defendants' request, procured abstracts of title to said lands and sent the same to them. Later, *H. G. Flieth,* in defendants' behalf, paid $300 upon the first year's instalment of purchase money. At defendants' request such contracts described M. A. Flieth as the purchaser, who was the wife of *W. H. Flieth.* Plaintiff has always been ready to carry out said contracts on his part, and in May, 1913, duly tendered said contracts to defendants for execution but they refused to execute the same or perform as they had agreed.

The relief prayed for was that defendants should be required to execute the contracts, pay the purchase money which was due thereon and the taxes which became due sub-

sequent to the date of the agreement, and pay costs and disbursements of the action.

The Flieths answered jointly to this effect: In the negotiations with plaintiff, *W. H. Flieth* and *H. G. Flieth* acted on behalf of M. A. Flieth. The $300 was paid in her behalf pending the negotiations. The character of the lands and prospects in regard thereto were falsely represented, inducing such payment and continuance of negotiations. Thereafter, before reaching a conclusion as to the purchase, defendants discovered the facts, refused to go further with the matter and demanded back the $300, which was refused. They further answered counterclaiming for a recovery of the $300 and interest.

Defendant *Thompson & Flieth Lumber Company* answered admitting that *W. H. Flieth, H. G. Flieth,* and M. A. Flieth negotiated with plaintiff through his agent for purchase of the land, denying that any contract resulted or that any negotiations occurred in its behalf and putting in issue material allegations of the complaint.

This was established by evidence: April 8, 1913, the agent mentioned in the complaint, who was conceded to have authority in respect to the matter, wrote *W. H. Flieth* proposing to sell the land in question at the price mentioned in the complaint,—$1 per acre, to be paid for the first year.

April 13, 1913, *Thompson & Flieth Lumber Company,* by *W. H. Flieth,* secretary and treasurer, replied that "I will take up the matter . . . with *H. G. Flieth* and if he wishes to do anything, shall be pleased to advise you without delay."

Three days later the company, by *W. H. Flieth,* further answered Mr. Stevenson's letter: "I have taken this matter up with *Mr. H. G. Flieth* and he advises me to have you get out the necessary papers . . . on the basis of $1 per acre for the first year's payment; but to make the contract separate for each forty so that we can pay them up if we so desire.

You may make them out in the name of M. A. Flieth, sending contracts with abstracts, to the National German-American Bank for collection."

According to the instructions aforesaid, contracts in due form were drawn in duplicate, duly signed on behalf of plaintiff, and sent to *H. G. Flieth* to be executed, and one of each set to be then returned. Such contracts specified the price of the land and terms of payment.

After the contracts were received, *H. G. Flieth,* by mail, sent $300 to apply thereon, saying "Here is $300 on the land we are getting." In a letter written by the company February 6, 1914, it treated the payment as having been made with its money. May 14, 1913, *W. H. Flieth,* by letter, advised Stevenson that *H. G. Flieth* had agreed to cover the $1 initial payment on the lands and that, "as soon as the abstract is received and title looked over, I shall be pleased to send you the contracts properly signed."

August 1, 1913, by letter, Stevenson requested *W. H. Flieth* to send the contracts at once, to which reply was made that he had not had time to take up the matter but hoped to do so without delay.

August 25, 1913, *Thompson & Flieth Lumber Company,* by *W. H. Flieth,* secretary and treasurer, advised Stevenson that the land was "misrepresented to me." "I could not conscientiously recommend it to any of my friends." "If you will kindly return the money we have advanced in the deal we will be pleased to return the papers unexecuted."

There was some conflicting evidence as to whether material misrepresentations were made by Stevenson which induced defendants to go as far as they did with the negotiations and pay the $300, and further evidence that defendants refused, upon plaintiff's demand, to execute and carry out the contracts as he claimed the same were made; that *H. G. Flieth* was the father of *W. H. Flieth,* M. A. Flieth was the latter's wife, *H. G. Flieth* was the president and *W. H. Flieth* the

secretary and treasurer of the company; that they were the active directors and principal stockholders thereof; that they had authority to make such contracts as those in question; that the letter, signed by the company, was written by *W. H. Flieth;* that the eight separate contracts were prepared as requested in the letter written by him; that he made no objection thereto, and that the abstracts were received but not examined. The contracts were dated April 18, 1913. So far as necessary, further reference to evidence found in the record will be made in the opinion.

The court decided: (1) Plaintiff and defendants, April 18, 1913, agreed in writing upon a sale by the former to the latter of the land in question for $5,713.22, $326.51 in cash and the balance payable in five equal, annual instalments with six per cent. interest per annum payable annually, the purchaser to pay taxes levied for 1913, and thereafter. (2) Later, in May, 1913, the defendants paid $300 on the purchase money but thereafter refused to further perform their agreement. (3) Four thousand three hundred eight dollars and forty-one cents for principal and interest is due. (4) There will become due, $1,077.48 April 18, 1917, and a like sum April 18, 1918, with interest on each sum from April 18, 1916, payable annually. (5) There are outstanding tax certificates on the lands for 1913, 1914, and 1915. (6) No false representations were made to defendants of the character mentioned in the complaint.

As conclusions it was held that the *Lumber Company, W. H. Flieth,* and *H. G. Flieth* should, within thirty days after service of notice of the entry of judgment, execute the several land contracts mentioned, or, if the originals could not be produced, execute the copies in lieu thereof filed with the court; that they should be required to pay plaintiff the amount due as found, as aforesaid, with interest from September 6, 1916, pay the balance of the purchase money as the same should become due, and redeem the lands from the

tax liens; that they are not entitled to recover on their counterclaim; and that plaintiffs should recover of them costs.

Judgment was rendered accordingly.

A. W. MacLeod of Washburn, for the appellants.

For the respondent there was a brief by *John J. Fisher* of Bayfield, and oral argument by *Mr. Fisher* and by *Mr. Byron H. Stebbins* of Madison.

MARSHALL, J. The principal point raised by appellants is that the finding that defendants made a contract with plaintiff to purchase the land, as claimed, is not supported by the evidence.

Respondent first replied that exceptions to the findings were not filed within ten days after due service of notice of the entry of judgment as provided by sec. 2870, Stats., and were not incorporated into the bill of exceptions. No answer is made thereto by appellants' counsel.

The record discloses that notice of the entry of judgment was duly served on the 8th day of November, 1916, and that exceptions to the findings were not filed until seventeen days thereafter. A copy thereof, marked in pencil, "duplicate," is in the bill of exceptions with pencil marks across the face. The trial court certified that the bill contained "the exceptions filed to the findings." We conclude that the paper marked as aforesaid was in the bill when certified and was taken as a copy of the exceptions, and hold that they were sufficiently incorporated in such bill.

The court may allow exceptions to findings to be filed after the time provided by statute. *Ottillie v. Wœchter,* 33 Wis. 252. While exceptions filed without leave after the time has expired are of no effect,—*Wis. River Imp. Co. v. Lyons,* 30 Wis. 61,—exceptions not so filed, if found in the record unexplained, are to be regarded as having been filed by leave under sec. 2831, Stats. *Henrizi v. Kehr,* 90 Wis. 344, 63 N. W. 285; *Killingstad v. Meigs,* 147 Wis. 511, 133 N. W.

632. So we conclude that the exceptions here were regularly filed and sufficiently incorporated in the bill and that they are sufficiently specific to permit a review thereof without the aid of sec. 2405*m*, Stats.

We are unable to find any satisfactory evidence of defendants having made contracts with plaintiff as found by the court, but do find quite satisfactory evidence that *Thompson & Flieth Lumber Company* did do so.

The defendants *W. H.* and *H. G. Flieth* do not appear to have dealt with plaintiff in their individual capacities. They were not engaged in dealing in lands but their company, under their administration, was so dealing. The whole history of the matter indicates that they so dealt in the particular case; that plaintiff's agent so understood the matter and that M. A. Flieth, wife of *W. H. Flieth,* as the fact is, did not have anything to do with the matter; but her name was used to represent the real party,—the corporation.

The first letter on behalf of plaintiff proposing to sell the land, as the statement indicates, was addressed to *W. H. Flieth,* who was the secretary and treasurer of the corporation, and who, naturally, as the fact was, conducted the correspondence on the part of the proposed purchaser. Such purchaser was plainly indicated by the reply, in the name of the company, that *W. H.,* the secretary, would take the matter up with *H. G.,* the president, and if he wanted to do anything about the matter "I shall be pleased to advise you without delay." That indicates that the whole subject was left to the president to dictate, which was a natural course if the matter was a corporation enterprise.

There is nothing about the situation up to this point to indicate that *H. G.* was negotiating as a proposed purchaser. That he was not is confirmed by the further letter written in the name of the company to the agent that *H. G.* had directed that the papers be gotten out on the basis of the proposed sale; the name of M. A. Flieth to be used as the executory vendee,

who really had nothing to do with the matter, as before stated. The making out and sending of the contracts and abstracts which later occurred, and assent to the terms thereof, which clearly occurred, supplied any previous want of a specific agreement as to terms of payment for the land.

That the contracts as drawn were agreed to, unmistakably appears by the fact that no objection was made to them, though they were retained for months before the final act occurred refusing to execute them; that, after they were received, $300 of the stipulated down payment was made thereon and that, in the end, the refusal to complete the matter was upon the ground of false representations and that such notice of refusal was conveyed by a letter in the name of the corporation.

The $300 appears to have been sent in a personal letter of *H. G. Flieth,* the president, after the written contracts and abstracts were received by the company, and some time later the secretary excused failure to have the papers executed upon the ground that he had not had time to take the matter up, evidently referring to examining the abstracts. The letter written some time later, in the name of the company by the secretary, declining to carry out the contracts upon the ground of false representation and requesting a return of the $300, is consistent only with the money having been paid by the corporation, regardless of whether it was furnished by *H. G. Flieth* personally. It is significant that the latter spoke of the money as that which "we," evidently referring to the corporation, "have advanced in the deal;" that return of the papers was offered only upon condition of a return of the money; and that in an independent transaction with plaintiff this $300 was treated as corporate property.

The foregoing convinces us, as before indicated, that the contracts claimed to have been made with defendants were not made with them but were, in fact, made with *Thompson*

& Flieth Lumber Company, the name of M. A. Flieth being used to stand for that of the company, though without any concern of hers, and that the court should so have found. All of the writings may properly be considered together. If in all a contract in writing clearly appears, which we think is the case, that satisfies the statute of frauds, and all requisites of specific performance. *Curtis L. & L. Co. v. Interior L. Co.* 137 Wis. 341, 118 N. W. 853. There does not appear to be any difficulty as to the terms of the agreement, since the minds of the parties evidently met, as indicated, in the formal written contracts, the name of M. A. Flieth being used, as we have suggested and all understood, to represent the corporation.

The contracts were sufficiently signed on the part of the vendor by his agent. Such is the statute, sec. 2304, Stats. *Dodge v. Hopkins,* 14 Wis. 630; *Smith v. Armstrong,* 24 Wis. 446; *Brown v. Griswold,* 109 Wis. 275, 85 N. W. 363; *Tufts v. Brace,* 103 Wis. 341, 79 N. W. 414. The signature of the vendor to the writing was sufficient to give it validity if the other party accepted and adopted it. *Lowber v. Connit,* 36 Wis. 176. That there was such acceptance and adoption appears by the contracts having been retained without objection for months, the payment made thereon, no objections having been made to the title, and the refusal to perform having been upon the ground of false representation, which, if true, would have constituted good ground for rescission and seems to have been claimed for that purpose.

It follows that, had plaintiff refused to perform upon receiving full payment or being duly tendered the same, the vendee *Lumber Company* could have compelled him to do so by action for specific performance. The right of the vendor, in such case, may be likewise enforced. Their rights are mutual as to remedies. Pomeroy, Contracts (2d ed.) sec. 6; Waterman, Spec. Perf. § 15. This court has so held, as in-

dicated in cases cited by counsel for respondent: *Gates v. Parmly,* 93 Wis. 294, 306, 66 N. W. 253, 67 N. W. 739; *Kipp v. Laun,* 146 Wis. 591, 602, 131 N. W. 418; *Curtis L. & L. Co. v. Interior L. Co.* 137 Wis. 341, 346, 118 N. W. 853. That is the general rule, as indicated in 36 Cyc. 565, notes 49 and 50, though, in practice, payment of the purchase money is, probably, generally enforced by the sale of the land to satisfy the amount due for purchase money and costs, and a judgment for the deficiency, if any, enforceable by execution. 36 Cyc. 566, note 54; *Loveridge v. Shurtz,* 111 Mich. 619, 70 N. W. 132; *Anderson v. Wallace L. & M. Co.* 30 Wash. 147, 70 Pac. 247; *Burger v. Potter,* 32 Ill. 66; *Corbus v. Teed,* 69 Ill. 205. We incline to the view that such is the better practice, or a resort to the remedy by strict foreclosure, which is the ordinary way of enforcing the rights of a vendor under a land contract, especially in absence of some special circumstances showing clearly that such remedies are inadequate to fully protect the vendor's right. Otherwise, in case such relief as was granted here is awarded, without provision limiting enforcement of the requirement to pay, to use of an execution, as in ordinary cases for the enforcement of a money recovery, such enforcement might be by a contempt proceeding contrary to the policy of our system. There is a provision here for an execution; but it seems to be in addition to the positive requirement to pay the amount due. There is no special circumstance warranting such a drastic remedy. So if there should be specific performance as to execution of the contracts, it is thought that justice requires a milder remedy for enforcement of payment of the purchase money.

It may be that relief of the nature of that granted here has been sanctioned in this court but we do not find any instance of the kind. The relief sought in *Gates v. Parmly, supra,* was by strict foreclosure. In *Kipp v. Laun, supra,*

the remedy for collection was by execution, and in *Curtis L. & L. Co. v. Interior L. Co., supra,* there was no provision to enforce collection.

The findings of fact, aside from the one above treated, appear to be sufficiently supported by the evidence and no reason appears why there should not be specific performance decreed as to the real executory vendee executing the contracts.

It is suggested that whether specific performance should be granted in any case of this sort rests in the sound discretion of the court. That is not strictly so. There is no arbitrary judicial power in such a case. The parties being competent to contract, and having made an agreement reasonably certain in all its parts, and not objectionable for unfairness or inequity, there is no room for the exercise of judicial discretion as to whether it should be specifically performed. Such performance is a matter of right. No reason is perceived why that does not apply in this case.

The judgment should be reversed except as to the *Thompson & Flieth Lumber Company,* as to which it should be modified to require the written contracts to be executed by it as sole vendee, and otherwise so as to harmonize therewith, and, further, should be modified to provide for enforcement of payment of the amount adjudged to be due on such contracts up to the time of the re-entry of judgment in the court below, including back taxes, by execution only; but without prejudice to plaintiff proceeding by action to enforce such contracts by strict foreclosure, in lieu of so collecting such amount due, or in case of failure to so collect. The judgment should be for costs against said company and for dismissal as to the other defendants, without costs to either side.

By the Court.—The judgment is ordered in accordance with this opinion, and the cause remanded for further proceedings in the court below, as here directed. Plaintiff,

upon filing the record in such court, may, upon ten days' notice to the attorney for the *Thompson & Flieth Lumber Company,* re-enter judgment there in accordance herewith, the re-entered judgment to include the amount due upon the contracts and amount required to pay the back taxes down to the date of the re-entry. Judgment for costs in this court is to go in defendants' favor for clerk's fees only.

HERREM, by guardian *ad litem,* Appellant, vs. KONZ, Respondent.

April 27—May 15, 1917.

Negligence: Gross negligence: Pleading: Unguarded shafting: Injury to child.

1. A complaint alleging that, with the knowledge and consent of defendant, children of tender age living near his sawmill were in the habit of playing underneath said mill in close proximity to an unguarded revolving shaft which, because of the rapidity of its revolution and the darkness of the place, was inherently dangerous to such children, and that solely because of defendant's negligence in failing to guard said shaft and take other necessary precautions the plaintiff (one of said children) was caught by the shaft and severely injured, is *held* to state a cause of action for ordinary negligence, the defendant being bound, under the circumstances stated, to anticipate that an injury might result to some child.
2. Allegations of the above facts, in a so-called second cause of action, together with an averment that plaintiff was injured solely because of defendant's *gross* negligence in failing to guard said shaft and his utter disregard of the safety of the children, do not state a cause of action for gross negligence.
3. If the facts alleged in a pleading do not show an intent, either actual or constructive, to cause injury, or conduct evincing a total disregard for the safety of persons or property, they do not constitute gross negligence, even though the pleading characterizes them as such.

APPEAL from an order of the circuit court for Taylor county: G. N. RISJORD, Circuit Judge. *Affirmed in part; reversed in part.*

This is an action by the plaintiff, *Alfred Herrem,* an infant, by his guardian *ad litem,* Arnt Herrem, to recover damages for an injury alleged to have been caused through the negligence of the defendant, *S. A. Konz,* who is engaged in the lumber manufacturing business at Rib Lake, Taylor county, Wisconsin.

Plaintiff alleges that the main floor of the defendant's mill is raised eight or nine feet above the ground; that there are open spaces underneath the floor of the mill; that an unguarded, revolving shaft was located in the open spaces under the mill; and that children of the families living near the mill were in the habit of playing underneath the mill with the knowledge and consent of the defendant.

On September 1, 1914, *Alfred Herrem,* the plaintiff, a child nine years of age, while playing around the shaft was caught by the revolving shaft and was seriously and permanently injured. The plaintiff claims that because of his suffering and his permanent injuries he is entitled to recover damages therefor from the defendant, upon the ground that the defendant was guilty of negligence which proximately caused the injuries complained of.

Among other allegations the complaint states:

"That there were at all of the times hereinafter mentioned many families, having children of tender age, living in the vicinity of the mill, and that said children were in the habit of playing around the sawmill and in the sawdust piles and were in the habit of going underneath the mill of the defendant and playing in close proximity to said unguarded shaft, with the knowledge and consent of the defendant;" and ". . . that solely because of defendant's negligence in failing to guard said shaft, which because of its rapid speed and the darkness of the place was inherently dangerous to children of tender years, and the further negligence in failing to inclose said machinery and space underneath the mill and to take such other precautions as were necessary, the plaintiff became entangled with and wound around said shaft and was severely and permanently injured."

The facts alleged in the complaint as the first cause of action are repeated in substance as a second cause of action and declare

"that solely because of the defendant's gross negligence in failing to guard said shaft and defendant's utter disregard of the safety of children in said premises the plaintiff became entangled with and wound around said shaft and was severely and permanently injured."

The defendant demurred to the first alleged cause of action and to the second alleged cause of action on the ground that it appears on the face of the complaint that they do not state facts sufficient to constitute a cause of action. He also demurred to the complaint on the ground that the several causes of action had been improperly united.

The circuit court sustained the demurrer to each of the alleged causes of action, and gave the plaintiff twenty days in which to serve an amended complaint. The plaintiff appeals from this order.

For the appellant there was a brief by *Martin, Martin & Martin,* and oral argument by *Gerald T. Clifford,* all of Green Bay.

Herman Leicht of Medford, for the respondent.

SIEBECKER, J. It is evident from an inspection of the allegations of the complaint that the second alleged cause of action is a repetition of the facts alleged in the first cause of action charging that the defendant was guilty of ordinary negligence toward the plaintiff in the respect stated and that it proximately caused the plaintiff's injuries, with the additional allegation "that solely because of the defendant's gross negligence in failing to guard said shaft and defendant's utter disregard of the safety of children in said premises" the plaintiff was injured. This allegation adds nothing by way of fact to the charge in the first alleged cause of action. If the facts alleged do not constitute gross negli-

gence as defined in the adjudications of this court, then the allegation characterizing them as "gross negligence" cannot make it so. *Rideout v. Winnebago T. Co.* 123 Wis. 297, 101 N. W. 672. The essential character of "gross negligence" is clearly set forth in the following:

"It is obvious that no degree of mere carelessness or inadvertence, however remote from the care customarily used either by the ordinarily careful man or by the exceptionally careless one, constitutes gross negligence." The latter suggests necessarily "intent, either actual or constructive, to cause injury," or conduct evincing "a total disregard for the safety of persons or property." *Watermolen v. Fox River E. R. & P. Co.* 110 Wis. 153, 85 N. W. 663.

It is manifest that the facts pleaded do not permit of an interpretation to the effect that the defendant was guilty of an actual or constructive intent to cause another injury in the respects charged in the complaint, and hence the complaint does not state a cause of action for "gross negligence" as claimed by the plaintiff, and the demurrer to the second cause of action was properly sustained.

The question is, Did the court err in holding that the complaint does not state a cause of action for ordinary negligence? The allegations of the complaint above set forth charge that the defendant knew that children of tender age living in the immediate vicinity of his lumber mill were in the habit of playing in the open spaces underneath the ground floor of the mill in close proximity to a rapidly revolving shaft, which under the alleged facts and circumstances was inherently dangerous to children of tender age. These allegations must be liberally construed in passing on the issues presented by the demurrer. We cannot anticipate whether or not the evidence upon a trial of the case will sustain the complaint in all its intendments. But the pleading on its face alleges sufficient facts to charge the defendant with negligence towards the plaintiff as a boy of tender years, in that it charges that he played upon the premises of the defendant

with the permission of the defendant and that the rapidly revolving shaft in the alleged location and unprotected condition was inherently dangerous to children of tender years. Under these circumstances the defendant was bound to anticipate that an injury might result to some child by coming in contact therewith. This brings the alleged cause of action within the law of the case of *Meyer v. Menominee & M. L. & T. Co.* 151 Wis. 279, 138 N. W. 1008, and *Brinilson v. C. & N. W. R. Co.* 144 Wis. 614, 129 N. W. 664. The court erred in sustaining a demurrer to the first alleged cause of action.

By the Court.—The order appealed from is affirmed as to the second alleged cause of action and is reversed in all other respects, and the cause is remanded with direction to enter an order as indicated in the opinion.

KARRAS, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

April 27—May 15, 1917.

Master and servant: Injury: Employment in interstate commerce: Federal or state statute? Assumption of risk: Unsafe appliance: Simple tool: Duty of employer.

1. A mere manufacture or preparation of material which is destined at some time in the future to be used in interstate commerce is not interstate commerce work. So *held* as to the peeling of railroad ties when done as a part of their manufacture independent of, and separate from, any immediate use of them in track repair, although the work was done by an employee, and upon the right of way, of a railway company engaged in interstate commerce.
2. An action against the railway company for a personal injury sustained by the employee while engaged in said work was governed by the state, and not by the federal, statute, and he did not assume the risk arising from a failure of the employer to furnish reasonably safe appliances for the work.

3. The injury in such case was caused by a chip striking plaintiff's eye as he was chopping a knot on a tie with a dulled and short-handled hatchet which had been furnished to him for doing the work, and which he had been using for about two hours. *Held*, that such hatchet was a simple tool, that plaintiff, who was a man of mature years, must be deemed to have comprehended the ordinary and usual results of its use, that no duty devolved upon defendant to inspect it or instruct plaintiff in its use, and that the trial court should have set aside a finding by the jury that the hatchet was not a reasonably safe appliance for the purpose for which it was used.

KERWIN, SIEBECKER, and ESCHWEILER, JJ., dissent.

APPEAL from a judgment of the circuit court for Iron county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Action for personal injury. In February, 1913, plaintiff, then about fifty years of age, came to this country from Greece. Since his arrival and up to the time of his injury on June 12, 1915, his principal employment was that of a section repair man on railroads. On June 12th, for the purpose of peeling hemlock ties, he was given a hatchet or small broadax beveled on one side, with a handle about fourteen inches long measured from the head. The hatchet was dull and somewhat nicked. A couple of hours after he began work, he said, "I started to peel one hemlock tie, and I find one knot or bark there, and I strike it hard many times and the bark came out or the knot and strike me on the right eye," from which blow to the eye the injury complained of resulted. Plaintiff came from a farm in Greece where there was no wood and had had very little experience in the use of an ax or hatchet.

The case was tried to a jury and it found (1) that the hatchet was not a reasonably safe appliance for the purpose for which it was used; (2) that the failure to furnish a reasonably safe appliance was the proximate cause of the injury; and (3) damages in the sum of $750. The court entered judgment for defendant notwithstanding the verdict upon the ground that plaintiff at the time of his injury was

engaged in interstate commerce and assumed the risk. The plaintiff appealed.

For the appellant there was a brief by *William E. Fisher* of Stevens Point, attorney, and *James A. O'Neill* of Ironwood, Michigan, of counsel, and oral argument by *Mr. Fisher.*

R. N. Van Doren of Milwaukee, for the respondent.

VINJE, J. Was the trial court right in holding that plaintiff was engaged in interstate commerce? There is no question but that the defendant was so engaged and that any actual repair work to its track at the time and place of injury would be interstate commerce work. *Pedersen v. D., L. & W. R. Co.* 229 U. S. 146, 33 Sup. Ct. 648. The nature of the work being done at the time of the injury determines whether or not it is an interstate commerce employment. *Ruck v. C., M. & St. P. R. Co.* 153 Wis. 158, 140 N. W. 1074; *Ill. Cent. R. Co. v. Behrens,* 233 U. S. 473, 34 Sup. Ct. 646. It appears that the ties plaintiff was peeling had been purchased by defendant at Watersmeet, Michigan, and shipped to this track section. They were dumped in piles of from thirty to fifty and more to be peeled and subsequently used where needed in the repair of the track. They were so used during the summer and up to some time in September. Ties with the bark on were not put into the track. Hence, in order to be fully prepared for track repair, they must be peeled. The peeling, therefore, was a part of the process of manufacture of the ties for the purpose intended. This process, in the case at bar, was carried on independent of, and separate from, a then immediate use of the ties in track repair. It was a preparation of them for future use. That it was done by the defendant upon its right of way instead of by others elsewhere, or that the ties were destined for interstate commerce, cannot constitute the process of their manufacture interstate commerce work. To constitute that there must be an actual entering

upon or engagement in such work. A mere manufacture or preparation of material which is destined at some time in the future at some place to be used in interstate commerce work is not enough. *Sullivan v. C., M. & St. P. R. Co.* 163 Wis. 583 (158 N. W. 321) and cases cited on page 587; *Minneapolis & St. L. R. Co. v. Winters,* 242 U. S. 353, 37 Sup. Ct. 170. It follows that plaintiff was not engaged in interstate commerce work at the time of his injury.

Were the jury warranted in finding that defendant was negligent in furnishing a dull and nicked hatchet with a short handle? It is urged, and there is evidence to support the claim, that a dull and nicked hatchet tends more than a sharp one to throw the chips towards the one using it, and that the head and eyes must be held nearer the work when using a short-handled hatchet than a long-handled ax. This may be conceded. But it does not follow from such concession that a dulled and short-handled hatchet, for the purpose for which this was used, is not a simple tool within the meaning of the rule announced in *Stork v. Charles Stolper C. Co.* 127 Wis. 318, 106 N. W. 841; *Meyer v. Ladewig,* 130 Wis. 566, 110 N. W. 419; *Lehman v. C., St. P., M. & O. R. Co.* 140 Wis. 497, 122 N. W. 1059; and in *Kolasinski v. C., M. & St. P. R. Co.* 164 Wis. 50, 159 N. W. 563. We deem it a simple tool. A man of mature years in the full possession of his senses must be held to comprehend the ordinary and usual results that follow the use of a dulled, short-handled hatchet in the operation of peeling ties. Adult, sane human beings, though not of a high order of intelligence or of great experience, must be accorded some field within which they may be said to fairly comprehend the ordinary and usual results of the work in which they are engaged. If the use of the hatchet in question does not come within that field it is difficult to conceive what does. Plaintiff had used the hatchet two hours before he was hurt and the length of the handle and its dulled condition must have become apparent

to him before his injury occurred. True, one may argue that many results may follow this or that condition of a tool, and that the results are not easily ascertainable or understood by men lacking in experience—and one may add by those of the ripest experience when it comes to forecasting all the results that may follow from a given condition. The field of argument is limitless; but one can hardly solve such questions satisfactorily by reasoning. They lie rather within the field of perception,—within that field wherein the average experience of mankind furnishes the best standard. Tested by such experience, we think the hatchet and the use thereof constituted one of those simple tools and operations whose probable results must be held to be practically as familiar to one mature man as to another. For that reason no duty devolved upon the defendant to inspect the hatchet or instruct plaintiff in the use thereof. *Gibson v. Milwaukee L., H. & T. Co.* 144 Wis. 140, 143, 128 N. W. 877.

The conclusions reached show that the trial court erred in holding that plaintiff was engaged in interstate commerce and also in not setting aside the answer of the jury to the first question of the special verdict. The result is the judgment must be affirmed, but upon a different ground.

By the Court.—Judgment affirmed.

KERWIN, J. (*dissenting*). It is conceded in the majority opinion that the plaintiff was not engaged in interstate commerce.

The jury found (1) that the hatchet plaintiff used in peeling bark at the time he was injured was not a reasonably safe appliance for that purpose; (2) that the failure to furnish a reasonably safe appliance in peeling bark was the proximate cause of the plaintiff's injury; (3) damages assessed at $750. These findings of the jury are supported by the evidence and judgment should have been for the plaintiff for the amount of damages found. The rule is elementary that

it was the duty of the defendant to furnish the plaintiff reasonably safe tools and implements with which to do his work. *Lehman v. C., St. P., M. & O. R. Co.* 140 Wis. 497, 122 N. W. 1059; *Borden v. Daisy R. M. Co.* 98 Wis. 407, 412, 74 N. W. 91; *Boelter v. Ross L. Co.* 103 Wis. 324, 79 N. W. 243; *Meyer v. Ladewig,* 130 Wis. 566, 110 N. W. 419.

There is an abundance of evidence to support the verdict that the hatchet was not a proper tool for doing the work,—that it was a dangerous implement to use for such purpose, and that plaintiff was ignorant of the danger.

The plaintiff testified that he never used an ax before he came to this country; that he never saw any one cut wood with an ax in Greece; that there was no wood where he lived in Greece. The evidence further shows that a sharp ax with a long handle is the proper tool to use for peeling ties, and that a hatchet such as the one used by plaintiff was not a proper tool for the work and was dangerous because of being dull and having a short handle, which necessitated the operator keeping his face near the hatchet and on the beveled side from which the chips and bark would fly. A witness, who showed much experience in peeling ties, said he never saw a hatchet used for that purpose, and said it was not a proper tool to use because the employee using it would be likely to get hurt; that with a long-handled ax one can stand up straight and keep his face away from the bark and knots that fly from the ax. The hatchet in use had a square face on the left side and was beveled on the right side. The tie was laid on the ground so that when operating the hatchet it would throw the flying material into plaintiff's face, which, on account of the shortness of the handle, was only about fourteen inches from the hatchet. The first day plaintiff was given a long-handled ax which was generally used, but on account of there not being a sufficient number of axes on the day of the injury for all employees engaged in peeling ties, plaintiff was given a hatchet and told to work with it, and was injured a short time after

he began work—one witness says half an hour and another two hours after he began work; that an ax worker is a skilled workman.

Plaintiff testified that he had hold of the hatchet with both hands; was standing chopping on the right-hand side toward where he was facing. He further testified:

"At the time I got hurt, I got the hatchet in my hands and I started to peel one hemlock tie, and I find one knot or bark there, and I strike it hard many times and the bark came out or the knot and strike me on my right eye, and I fell down and I don't understand where I was. The hatchet was about this long [indicating about twelve inches]. It had a short handle and was dull, just like a saw—it had that nicks. I didn't have any other tool in peeling ties. The boss handed the hatchet to me. He didn't have tools enough to give to the men to peel ties. He borrowed an ax from a farmer to give to another fellow."

The majority opinion is made to turn upon whether the hatchet was a "simple tool." The question is not whether the hatchet was a simple tool, but whether it was a fit and safe tool for the use. The tool was simple when used for the purpose intended. As said in *Ruck v. C., M. & St. P. R. Co.* 153 Wis. 158, 140 N. W. 1074: "The implement was simple enough in form. But it was not simple with reference to its use . . ." The negligence of defendant was in furnishing a defective tool and one not fit for the purpose for which it was used. *Meyer v. Ladewig,* 130 Wis. 566, 110 N. W. 419; *Ruck v. C., M. & St. P. R. Co., supra.* The evidence shows that the hatchet was kept for splitting wood, not for peeling ties.

The nonliability of a master in the case of furnishing to an employee a "simple tool" rests on the principle that warning or inspection on the part of the master is not necessary. The master is not bound to warn or inspect, because the defect is as open and obvious to the employee as to the master. *Stork v. Charles Stolper C. Co.* 127 Wis. 318, 106 N. W. 841;

Meyer v. Ladewig, 130 Wis. 566, 110 N. W. 419; *Kolasinski v. C., M. & St. P. R. Co.* 164 Wis. 50, 159 N. W. 563.

But the "simple tool" doctrine has no application to a case where a tool is furnished by the master for a purpose for which it is not fit, and the use of which in the business for which it is furnished is dangerous to the employee without knowledge on his part of the danger.

The rule is well stated by Mr. Labatt in his work on Master & Servant, when treating the subject, as follows:

(2) "A master is guilty of a breach of duty, if he fails to see that the instrumentalities supplied are of such a character and maintained in such a condition that his servants will be able to carry on their work without the risk of injury as long as they exercise proper care in the use of those instrumentalities.

"In the absence of other controlling considerations, therefore, the question whether an injured servant can recover will, in certain states of the evidence, hinge upon the question whether the instrumentality which caused the injury was one which, with reasonable care and caution, could be used by him without danger at the place and in the manner in which it was used." 3 Labatt, Mast. & Serv. (2d ed.) § 925, sub. (2).

Surely it cannot be said that the plaintiff, who had no knowledge of using an ax of any kind, could be said to be chargeable with knowledge that the hatchet furnished him was a dangerous implement and unfit for use in peeling ties. But the duty clearly rested upon the defendant to furnish a suitable tool for the work.

I am authorized to say that Justice SIEBECKER and Justice ESCHWEILER concur in this dissent.

HACKLEY-PHELPS-BONNELL COMPANY, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

April 27—May 15, 1917.

Workmen's compensation: Injury to employee while going for his pay: Service growing out of and incidental to employment: When employment terminates: Evidence.

1. An employee going in the usual manner for his pay to a place designated by the employer is performing a service within his employment.
2. Thus, where an employee of a logging company in one of its camps, being about to take a vacation, was given a time slip and was told to go, as was customary, by one of the company's logging trains to its office in a village some miles away to get his pay, and while riding on such train was accidentally injured, it is *held* that he sustained such injury while in the employ of the logging company and while "performing service growing out of and incidental to his employment," within the meaning of sub. (2), sec. 2394—3, Stats.
3. Although the employee testified in such case that when he received his time slip he was through with his work until he should come back again, this evidently referred only to such manual labor as he had been doing for his employer and was not conclusive upon the question whether the relation of employer and employee terminated at that time.
4. It being held that at the time of the accident the employee was acting within the scope of his employment as fixed by the contract and custom of the parties, it is unnecessary to consider what bearing, if any, the provision in sub. (2), sec. 2394—3, Stats., relating to employees going to and from their employment, has upon the case.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

In May, 1914, *Gus Drewetzki* was employed by an agent in Chicago to work for plaintiff in a logging camp near Phelps, Wisconsin. When he arrived at Phelps plaintiff's bookkeeper sent him to the camp by its logging train and told him to come to Phelps to get his pay. On February 8, 1915, *Drewetzki* told the foreman of the camp that he was going to

take a vacation and the foreman told him to go to Phelps to get his money and gave him a time slip for that purpose. He also told him that the first train was gone and that he would have to walk and meet the other one. *Drewetzki* walked three or four miles from camp and then got on the train, and while riding thereon received an injury to his arm which necessitated amputation at the shoulder, for which injury he was awarded compensation. Employees usually went from the camp at which they were working to Phelps on the logging train and railway owned and operated by plaintiff, and *Drewetzki* paid no fare for rides he had had on the train. He says he was through with his work when he received his time till he came back again. The plaintiff's cashier and auditor testified:

"The company furnished a train for employees to go out to the camp. It came in twice a day and we always told them about what time it left for camp, and sometimes we held the train until the afternoon passenger train came in, when we had quite a number of men coming in a day, and told the train men to take them out. There is a special car outside of the regular car on the train when there is a crowd—a wood car which we are using in taking wood to the chemical works. This road out to the camp at which the applicant worked is owned by the company and is used for carrying logs and wood to the town of Phelps, but not to carry passengers. It carries no passengers or freight for hire."

Plaintiff's construction foreman testified:

"The applicant worked for me three or four years prior to February 8, 1915. He used to go to town and take a vacation and then come back. On February 8, 1915, right after dinner, he told me that he was going to take a layoff for a few days, so I gave him his time slip and told him he would have to go to the office for the rest of his time and get his money there."

The *Commission* found that *Drewetzki* received his injury while in the employ of the plaintiff and while performing service growing out of and incidental to his employment and

awarded him compensation according to the statute. Plaintiff brought an action in the circuit court for Dane county to test the validity of the *Commission's* order awarding compensation, and from a judgment confirming the order it appealed.

The cause was submitted for the appellant on the brief of *Brown, Pradt & Genrich* of Wausau, and for the respondent *Industrial Commission* on that of the *Attorney General* and *Winfield W. Gilman,* assistant attorney general.

VINJE, J. The ground upon which plaintiff seeks to set aside the order of the *Commission* is that the employee was not at the time of his injury in the employment of plaintiff nor performing service incidental to or growing out of such employment, and it is claimed that this is conclusively shown because the employee testified that when he received his time slip he was through with his work until he should come back again. There is no dispute about the facts. That being so, the question whether the relation of employer and employee was terminated upon the receipt of the time slip is one that must be determined from correct inferences drawn from the undisputed facts. The employee's opinion concerning it could not bind the judgment of the *Commission* or that of the courts. But it is quite evident that the employee meant only that he had no further work to do for the employer till he came back—meaning by work only such manual labor as he had been doing for the employer. So the testimony relied upon does not materially affect the question determined by the *Commission.*

It appears from the evidence that Phelps was the headquarters for the logging operations of plaintiff. The employee was sent there from Chicago. He reported there for duty and was told by the bookkeeper to go to the camp in question, but that he had to come back to Phelps for his pay. His employer furnished the employees transportation free to and from the camps. That such means of transportation

were primarily used for the transportation of logs is immaterial. When the employee received his time slip he was told by the foreman that he had to go to Phelps to get his pay and he was informed that he could ride on the logging train, as he had done before and as he knew the custom was. The logging road and train belonged to the employer and were used in the prosecution of the business the employee was engaged in. The essential elements of the contract of employment were that the employee should render services for the employer and in return therefor the employer should pay him an agreed compensation. The duty to pay and the right to receive the compensation were integral parts of the contract of employment. For the convenience of the employer the place of payment was some distance from the place of service, but in going to and from such place of service the conveyance furnished therefor by the employer was used by the employee. So in going to get his pay he was but fulfilling a duty imposed upon him by the employer and using the means of conveyance which the employer furnished his employees for such purpose.

The general principle is that employment exists only in the area of duty. 1 Bradbury, Workm. Comp. (2d ed.) 405. Tested by this principle the employee comes within it. He was entitled under his contract to receive compensation for his services. His employer directed him to go to a place some distance from his work to get his pay and offered him the means of transportation for going there. He went in obedience to the duty placed upon him by his employer and acquiesced in by him—performing the last act under the contract whereby each could receive the full benefit thereof. Had the employer paid him at the camp a different question would be presented.

A number of cases are cited by the plaintiff holding that employees receiving injuries while coming or going to their employment in vehicles gratuitously furnished by the em-

ployer are not entitled to compensation. These do not touch the present case because those injuries were received before the employment began or after it terminated. Here the employee, as we have pointed out, was still performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract of employment were mutually satisfied.

If we turn to the text-books and decided cases on this subject we find that they sustain the view that an employee going in the usual manner for his pay to a place designated by the employer is performing a service within his employment. 1 Bradbury, Workm. Comp. (2d ed.) 438; 1 Honnold, Workm. Comp. 356; *Lowry v. Sheffield C, Co.* 1 Butterworth's Workm. C. C. 1; *Nelson v. Belfast Corp.* 1 Butterworth's Workm. C. C. 158; *Riley v. W. Holland & Sons,* 4 Butterworth's Workm. C. C. 155; *Re Phillips,* 1 Bull. Ind. Comm. of Ohio, 49. In *Lowry v. Sheffield C. Co., supra,* the facts were these: A collier left his work at 5 o'clock on a Saturday morning. At noon of the same day he went for his wages for a fortnight past. He went along a footpath which had been made by the employer for its workmen, and was going along the Great Central Railway line, which ran through the employer's premises, when he was knocked down by an engine and injured. He was not going to resume work till the following Sunday night. The court held that the employee was entitled to compensation, and through COZENS-HARDY, M. R., said:

"It is admitted that it was part of the contract of employment that the company should pay this man at their pay office and that he should go there to get his wages. While going to the pay office to get his wages he met with an accident on the company's premises. In these circumstances the court is asked to say the accident did not arise in the course of his employment. In my view it was just as much part of his employment to go to the pay office on that day at

that hour as it was to go down the pit on the following Sunday night."

In *Nelson v. Belfast Corp., supra,* it appeared that the workman went some distance from his place of work to get his pay and was injured while returning by being knocked down by a cart upon stepping off from a tram car. It also appeared that he was paid for the time consumed in going and coming, but his right to recover was not predicated upon the fact that he was paid for the time. Without referring to such fact the court held that the accident arose out of and in the course of the workman's employment. In *Riley v. W. Holland & Sons, supra,* the employee's work terminated on Wednesday. On the following Friday she went to the office to get her pay according to the custom of employees and was injured. The court held she was entitled to compensation, saying:

"Though her employment was at an end Wednesday night, in the sense that she ceased to work under the contract, yet the employment continued because of the obligation of the employers to her arising out of the employment and continuing until Friday noon."

In *Parker v. Pont,* 5 Butterworth's Workm. C. C. 45, compensation was denied to a workman who was going to get his pay and receive further instructions as to his work on the ground that he did not proceed by the usual means of conveyance but chose one more hazardous. This the court held he could not do at the risk of the employer.

Respondents rely upon sub. (2), sec. 2394—3, Stats. 1915, which provides that "Every employee going to and from his employment in the ordinary and usual way, while on the premises of his employer, shall be deemed to be performing service growing out of and incidental to his employment." Since we have come to the conclusion that the employee was acting within the scope of his employment as fixed by the

contract and custom of the parties, we have not found it necessary to consider what bearing, if any, this statutory provision has on the subject.

By the Court.—Judgment affirmed, with costs in favor of the respondent *Drewetzki.*

MANITOWOC BOILER WORKS, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

April 27—May 15, 1917.

Workmen's compensation: Findings by industrial commission: Supplying defect from memorandum of decision: Injury caused by failure to comply with order of commission: Guarding machinery.

1. A memorandum of decision made by the industrial commission as a basis for the more formal findings of fact may be referred to to supply a defect in the findings.
2. Within the meaning of sub. (5) (h), sec. 2394—9, Stats., an injury is caused by the failure of an employer to guard a machine in compliance with an order of the industrial commission, where that particular injury would not have been sustained by the employee if the machine had been guarded as required. Whether or not the failure to guard is the proximate cause of the injury, in the sense in which that term is used in the law of negligence, is immaterial.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Sufficiency of findings of the *Industrial Commission* to sustain an award for a penalty.

November 9, 1915, one Zander, an employee of the plaintiff, received injuries resulting in his death. The matter having been presented in due form to the *Industrial Commission,* it found that the wife was entitled to a death benefit of $3,000, and further found as follows:

"That at the time of said accident and death the respondent had failed and neglected to guard the wheels of the crane

upon which deceased was killed as provided in order No. 40 of the general orders of safety of the *Industrial Commission,* and that by reason of such failure the penalty provided by section 2394—9 must be added to the amount of the award herein," etc.

In its memorandum of decision the *Commission* made the following statement:

"The only question left for the *Commission* to decide is whether or not a penalty of fifteen per cent. in addition to the amount stipulated should be included in the award because of the alleged failure of the respondent to properly guard the crane wheels which caused the death of applicant's husband. Upon all the facts in this case it appears that the respondent operated a twenty-six-ton crane running on elevated tracks, supported by timbers fifteen feet apart and about twenty feet in height; that the crane was going at full speed, about the rate of a walking man, when the applicant [the deceased] was caught under one of the fore wheels of the crane while he was leaning over the track doing some repair work for the respondent company. The fore wheels were not guarded, as required by law, at the time of the accident. The deceased was four or five feet distant from a vertical post extending above the track on which the crane was running and approaching said post at the time he met his death. This post was a few inches distant from the track and clear from it. The respondent company claims that even though the fore wheels of the crane had been guarded, the applicant [the deceased] would either be pushed along the track and crushed against the vertical post or thrown to the ground, a distance of about twenty feet, and in either case would probably have been killed, and that the proximate cause of his death was not the failure to guard the wheels.

"We cannot find as a fact that this result would necessarily have followed had the wheels been guarded. He might have been crushed against the post and have lived, or have lost a leg or an arm, or he might have been thrown to the ground and seriously injured, but it does not necessarily follow he would have been killed had either of these contingencies followed, and we cannot find as a fact that he would have been killed in any event. Many miraculous escapes are recorded,

even after dangerous falls or crushing accidents, and we believe that failure to guard in this case, which caused the deceased to be crushed under the wheels of the crane, was the immediate cause of his death. Had the fore wheels of the crane been guarded he could not have met death in the manner he did. Therefore the *Commission* finds that the penalty of fifteen per cent. should be added to the award heretofore stipulated by the parties. Award for monthly payments will be entered according to the above."

Plaintiff commenced an action in circuit court to review the award. From the judgment of the circuit court affirming the award of the *Industrial Commission* the plaintiff appeals.

For the appellant there were briefs by *Brown, Pradt & Genrich* of Wausau, and oral argument by *L. A. Pradt.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

ROSENBERRY, J. Sub. (5) (h), sec. 2394—9, Stats.:

"Where injury is caused by the failure of the employer to comply with any statute of the state or any lawful order of the industrial commission, compensation as provided in sections 2394—3 to 2394—31, inclusive, shall be increased fifteen per cent."

Appellant contends that the findings of the *Industrial Commission* do not support that part of the award which awards the fifteen per cent. penalty to the widow, and that the evidence does not support the findings. Appellant claims that the *Industrial Commission* did not in the formal findings find as a fact that the failure to guard was the cause of the injury, and that reference may not be had to the memorandum to supply the defect in the findings.

We think recourse may be had to the memorandum of decision made by the *Industrial Commission* as a basis for the more formal findings of fact, and from this memorandum it

clearly appears that the *Commission* found that the accident could not have happened in the manner in which it did happen had the wheels been guarded. That the failure to guard the wheels resulted in the death of the deceased in the particular manner in which he did die is clearly found and clearly appears from the evidence. To say that he might or even probably would have been killed in some other manner had the wheels been properly guarded and that therefore the proximate cause of his injury was his own negligence and not the failure to guard the wheels, is to introduce into the case an element of speculation and to introduce into the administration of the Workmen's Compensation Act the element of proximate cause as that term was used and understood prior to the adoption of the act, neither of which do we think is permissible. An injury is caused by the failure of an employer to guard a machine where it appears as a fact that the particular injury from which the employee suffered would not have been sustained by the employee if the machine had been guarded as required by law, and the employer is liable therefor unless it is caused by a want of ordinary care on the part of the employee which is wilful. The chain of physical causation is complete, and whether or not the failure to guard is the proximate cause of the injury in the sense in which that term is used in the law of negligence is immaterial. *Milwaukee C. & G. Co. v. Industrial Comm.* 160 Wis. 247, 151 N. W. 245. Therefore we are of the opinion that the findings sustain the award and that the evidence sustains the findings.

By the Court.—Judgment affirmed, with costs.

STATE EX REL. OWEN, Attorney General, Respondent, vs. McINTOSH, imp., Appellant.

April 27—May 15, 1917.

Statutes: Method of ascertaining fact, when exclusive: Intoxicating liquors: Licenses: Number which may be granted: Population: Cities: "Majority vote" in council: Appeal: Failure to prosecute: Double costs.

1. Where the statute designates a method by which a certain fact is to be determined or ascertained, such method is exclusive.
2. Under sec. 1565*d*, Stats. 1915, but one license to sell liquors can be granted in a city unless its population exceeds 500, as shown by the last preceding national census or official estimate thereof made by the bureau of the census of the United States government. The facts that there has been no such census since the city was incorporated, and that to enable it to incorporate there must, under sec. 925—9, Stats., have been a population of 1,500 within the proposed city limits, do not affect the rule.
3. Under sub. (1), sec. 925—52, Stats., providing that no license to sell liquor in a city organized under the general charter law shall be granted except by a majority vote of all the members of the common council, and sec. 925—49, providing that the mayor shall not be counted in determining such a majority, a license could not be granted, where, four aldermen and the mayor being present, two aldermen voted "No" and two aldermen and the mayor voted "Yes."
4. In an action on behalf of the state to restrain the sale of liquors, where a defendant appealed from an order overruling his demurrer to the complaint, but did not serve or file any printed case or brief on such appeal, double costs are awarded to respondent under sec. 2951, Stats.

APPEAL from an order of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

The appeal is from an order overruling the demurrer of the defendant *McIntosh* to the complaint.

[No brief for appellant on file.]

For the respondent there was a brief by the *Attorney General* and by *John J. Fisher* of Bayfield, of counsel, and oral argument by *Mr. Fisher* and *Mr. J. E. Messerschmidt*, assistant attorney general.

ESCHWEILER, J. The complaint in this action is brought on behalf of the *State of Wisconsin* by its attorney general and demands judgment that each of the defendants be enjoined from selling intoxicating liquors on certain premises in the city of Bayfield.

The demand for such relief was predicated upon quite a number of grounds. Upon the overruling of the demurrer interposed, an appeal was taken by one of the defendants to this court, but no case or brief was served or filed on behalf of such appellant; and although the order might properly be affirmed under our rule for such failure, request has been made on behalf of the respondent that certain questions suggested by the attorney general should nevertheless be determined.

We deem it sufficient to say in this case that the demurrer was properly overruled upon the grounds hereinafter stated.

It is alleged that on October 26, 1916, a pretended license to sell liquors and drinks at retail upon the described premises was issued by the city clerk of Bayfield to the defendant *McIntosh;* that there was a license then in force issued by said city to another on June 30, 1916, for the year beginning July 1, 1916; that the city of Bayfield was incorporated as such in June, 1913; that since the organization and incorporation of Bayfield no United States census determining the population of said city has been made, nor has any official estimate thereof been made by the bureau of census of the United States government showing the population of such city; that no additional licenses could be legally granted except within the regulations expressed by the statute.

Sec. 1565*d,* Stats., regulates the question as to the number of licenses to be granted in any community. Prior to 1915 the statute provided that one such license may be granted to and issued for each 250 inhabitants or fraction thereof in any town, village, or city in this state, such population to be determined by the last preceding state or national

census. By ch. 453, Laws 1915, this regulation was changed from 250 to 500 inhabitants and such population was thereafter to be determined by the last preceding national census or official estimate thereof made by the bureau of the census of the United States government.

It has been repeatedly held by this court as well as others that such provisions must be strictly followed and that where a method is designated by which a certain fact is to be determined or ascertained such method is exclusive. *State ex rel. Terry v. Keaough,* 68 Wis. 135, 31 N. W. 723; *State ex rel. Treat v. Hammel,* 134 Wis. 61, 114 N. W. 97; *Menasha W. W. Co. v. Winter,* 159 Wis. 437, 445, 446, 150 N. W. 526; 1 Woollen & T. Intox. Liq. sec. 365; 23 Cyc. 126.

The facts that a census was taken by local authorities under the provisions of sec. 925—9, Stats., for the purpose of incorporating such territory as a city and that there must have been a population within its proposed limits of 1,500 in order to incorporate as provided in sec. 925—7, cannot take the place of the prescribed statutory regulation as to the national census or official estimate from the national census bureau. This view of the legislative intent is supported by the fact that by ch. 22, Laws 1917, this section, 1565*d,* is amended so as to provide that when new villages have been incorporated since the last preceding national census was taken, such population shall be determined by the census taken in the proceedings incorporating such villages. Had it been intended that the census for the incorporation purposes might be used as the basis of information on the question of the number of licenses in cities, it is apparent that the amendment of 1917 would not have been expressly limited to villages.

At the time the question of the issue of the pretended license to the defendant was voted upon at the council meeting there were present, according to the record, four aldermen and the mayor. On the motion to grant the license to de-

fendant two aldermen voted "Yes," two aldermen voted "No," and, the mayor voting "Yes," the motion was declared carried. Sub. (1), sec. 925—52, of the Statutes provides that no such license shall be granted except by a majority vote of all the members of the council. By sec. 925—49 of the Statutes it is declared that the mayor and aldermen shall constitute the common council, and that whenever a majority of the members of the common council is required to take any action the mayor shall not be counted in determining such majority, and that the mayor shall have no vote except in case of a tie.

We hold that under these statutes and the record shown here the vote of the mayor could not be counted, and that lacking his vote there was not a majority vote of all members of the council in favor of granting such license.

From the nature of the proceedings taken in this action by the defendant and his failure to do more on this appeal than to merely take the same, and thereby causing a delay in the granting to plaintiff of the relief to which, under the complaint, it was entitled, we deem this a proper case in which to award double costs to plaintiff under sec. 2951, Stats.

By the Court.—The order of the circuit court is affirmed, with double costs in favor of the plaintiff against the defendant.

RACINE RUBBER COMPANY, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

April 27—May 15, 1917.

Workmen's compensation: Injury to employee eating lunch: Service incidental to employment.

An employee who, while eating his lunch in the factory of the employer in accordance with a custom tacitly consented to by the latter, was injured by a pile of crude rubber falling upon him, was at the time "performing service growing out of and incidental to his employment," within the meaning of sub. (2), sec. 2394—3, Stats.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Robert R. Freeman,* attorney, and *Henry J. Bendinger,* of counsel, both of Milwaukee, and oral argument by *Mr. Bendinger.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

WINSLOW, C. J. An employee of a manufacturing concern was seated on a large piece of rubber in a room in the factory at the noon hour eating his lunch, in accordance with a long existing custom known by and tacitly consented to by his employer, when a large pile of crude rubber near him unexpectedly fell on him, breaking his leg. The question presented in this case is whether he was at the time of the accident performing service "growing out of and incidental to his employment" within the meaning of sec. 2394—3, Stats. (the Workmen's Compensation Act).

This question must be answered in the affirmative on the authority of *Milwaukee Western F. Co. v. Industrial Comm.* 159 Wis. 635, 150 N. W. 998.

By the Court.—Judgment affirmed, with costs against appellant in favor of respondent *Macaluso.*

WILL OF GRIFFITH: ENRIGHT, Respondent, vs. GRIFFITH and others, by guardian *ad litem*, Appellants.

April 25—May 15, 1917.

Wills: Validity: Execution: Attestation: Presumption: Signing by witnesses before testator: Testamentary capacity: Undue influence: Evidence: Error in description of property: Costs: Allowance to guardian ad litem.

1. An express request by the testator that the witnesses sign his will is not essential, an implied request or an assent to the signing being sufficient.
2. A formal attestation certificate or clause is not required by the statute (sec. 2282, Stats.) and is unnecessary.
3. The appearance, on the face of a will, of regularity raises a presumption of due execution which should prevail in the absence of clear and satisfactory evidence to the contrary.
4. The statutory regulations as to the execution of wills are intended to conserve the inherent right to dispose of property by will and should be administered so as to effect that purpose and not to defeat the right. Mere informality, where the essentials required are substantially satisfied, is immaterial.
5. Although the better way is for the witnesses to a will to sign after the testator has signed, that order of signing is not essential to the validity of the will if all sign when all are present and as part of one continuous transaction.
6. Findings by the trial court in this case that the testatrix had testamentary capacity, understood the contents of the will, and did not act under any undue influence, are *held* to be sustained by the evidence.
7. The fact that property of the testatrix, consisting of a lot in Milwaukee at 488 Van Buren street, was, by mistake of her nurse who wrote the will, described therein as 480 acres on Van Buren street, was immaterial.
8. No costs and no compensation payable out of the estate (under secs. 4041*a*, 4041*b*, Stats.) are allowed in the supreme court in this case to the guardian *ad litem* of unsuccessful contestants of a will; nor are costs awarded against such guardian or those whom he represents.

APPEAL from a judgment of the circuit court for Jefferson county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

Proceedings were commenced in the county court for pro-

bate of an instrument purporting to be the last will of Agnes Griffith, deceased. It was refused. The proponent, *Julia Enright,* sister of the deceased, appealed to the circuit court. The result was that the decision of the county court was reversed and judgment entered directing probate of the will. These, in substance, among others, were found as facts: About 7:30 p. m. April 9, 1914, Agnes Griffith, aged forty-nine years, died at her residence in Waukesha county, Wisconsin. She was survived by her husband, Henry Griffith, four minor children, William Enright, her brother, a married man of family, and *Julia Enright,* an unmarried sister, the proponent. The purported will, dated April 9, 1914, about 12 o'clock noon, at the residence of the testator, was duly signed by her by making her mark thereto in the presence of Thomas Palmer and Lydia Hillary, who then, by her implied request, attested her signature, as witnesses, in her presence, and in the presence of each other. The instrument was, in every respect, duly executed as the last will and testament of Agnes Griffith. She was not under the influence of any person. The instrument was her free and voluntary act and expressed her wish as to the disposition of her property. She had about $350 in value of personal property and a city lot on Van Buren street, Milwaukee, Wisconsin, on the south half of which there was a double house, known as 488 on said street. She inherited the property from her mother. It was worth about $5,000. She was of strong will and positive character. The sister was of middle age, having no special occupation and no means of support, nor property other than personalty of the value of about $400, and a lot inherited from her mother, on which was constructed one half of the double house aforesaid, worth about $5,000. She had, in part, supported herself by keeping boarders. Her relations with the testatrix had always been very close and affectionate. She had largely cared for the testatrix and her family in sickness. She and the children of the latter were

mutually affectionate. The testatrix's husband was worth about $35,000, largely accumulated during their married life. He obtained $600 from her about the time of the marriage which was never repaid. It was incorporated into his property. At the time of her decease he was in middle age, in good health, and with fair prospects of accumulating more property. When the will was made, she was suffering from appendicitis, complicated with peritonitis from which she died a few hours after the transactions. She took to her bed April 3, 1914. On each day from this time up to the time of making the will, she was in full possession of her mental faculties. In the morning of the day of her death, she said she felt easier and requested her nurse, who was alone with her, to get pencil and paper, which was done. She then dictated what she wanted written and the nurse wrote. She did not own any acre property on Van Buren street and knew that her property was known as 488 Van Buren street in Milwaukee. By mistake the nurse wrote 480 acres instead of 488 on Van Buren street. About an hour after the writing occurred, at her request, a doctor, she named, was sent for to perform an operation on her. Shortly after sending for the doctor, she was visited by Father Palmer, who administered to her the last rites of the Catholic church, of which she was a member. Then she requested all who were present, except Father Palmer, to retire and the nurse to be sent for. The husband did not at once retire and she signified to him that she desired him to do so. He complied. When there were present with her only Father Palmer, and the nurse, she requested the writing to be produced and handed to Father Palmer. That was done. It was then executed as before stated. She then told Father Palmer to take it and see that it got into the proper hands. She then expressed a wish to have her children brought up in her religion. About 1 o'clock p. m. thereafter she kissed them good by. She took no further active part in affairs while preparations were be-

ing made for the contemplated operation except to ask what was being done. Some hours later she recognized her brother and sister-in-law. She expired about 7:30 p. m. thereafter.

There was evidence produced as to all the matters referred to. The will was written by Miss Hillary on a paper she had for use as a nurse. There was testimony to the effect that she wrote what Mrs. Griffith requested her to. There was no proof that the writing was read to Mrs. Griffith. It was signed in due form, her name with her mark appearing below the writing and to the right, and the names of the witnesses a little lower down and at the left, indicating that they signed last. All occurred at one transaction. Father Palmer testified that he wrote her name and then she made her mark and that she delivered the paper to him after it was fully executed. The writing was as follows:

"April 9, 1914.

"I will Agnes Griffith will and bequeath to Sister *Julia* my real estate 480 acres on Van Buren Street, also all my personal things, to have and to hold without restriction.

"AGNES GRIFFITH X Her mark.

"Witnesses: Thomas Palmer.

"Miss Lydia Hillary."

The conclusion of law reached was that the county court erred in disallowing the will and, as before indicated, judgment was rendered accordingly. The minor children, by their guardian *ad litem,* appealed.

V. H. Tichenor of Waukesha, guardian *ad litem,* for the appellants.

For the respondent there was a brief by *Hennessey, Hennessey & O'Boyle,* attorneys, and *Vincent D. Hennessey,* of counsel, all of Milwaukee, and oral argument by *Vincent D. Hennessey.*

MARSHALL, J. It is first suggested that the will is fatally defective because of the witnesses not having signed at the

request of the deceased. True, there was no evidence of an express request for the signing; but that was not essential. The court found that there was an implied request and that is amply sustained by the evidence, and further, as is the fact, that the testatrix assented to the signing. Either is sufficient. *Will of Meurer,* 44 Wis. 392, 399; *Skinner v. American Bible Soc.* 92 Wis. 209, 213, 65 N. W. 1037; *Huff v. Huff,* 41 Ga. 696, 703; *Coffin v. Coffin,* 23 N. Y. 9; *Gross v. Burneston,* 91 Md. 383, 46 Atl. 993; *Burney v. Allen,* 125 N. C. 314, 34 S. E. 500; *Savage v. Bowen,* 103 Va. 540, 49 S. E. 668; *Allen's Will,* 25 Minn. 39; 40 Cyc. 1115.

It is next insisted that the finding as to the witnesses having subscribed their names to the instrument after it was signed by the testatrix is contrary to the evidence. There is some conflict on that matter, though considering all the circumstances, we should hesitate to hold that the finding is against the clear preponderance of the evidence. It is doubtful, at least, whether such a holding would be justified by the record. The will appears on its face to have been regularly executed. While there is not a formal attestation certificate or clause, that is unnecessary since the statute does not expressly require such. It merely provides that a will, to be valid, must be "signed by the testator or by some person in his presence and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses in the presence of each other." Sec. 2282, Stats.

The attestation and subscription feature is satisfied by the witnesses signing their names to the instrument to prove that it was signed by the testator as maker. As said in *Skinner v. American Bible Soc., supra,* "Anything further, in mere form, is not contemplated, and would be mere supererogation."

The importance of conserving the constitutional right to

dispose of property by will is such that the efficiency of an attempt to exercise such right should not depend on any "doubtful or inconclusive parol proof" as said in *Lewis's Will,* 51 Wis. 101, 113, 7 N. W. 829. The appearance, on the face, of regularity should be regarded as involving a presumption of due execution so strong as to prevail, in the absence of clear and satisfactory evidence to the contrary. That presumption stands in this case, supported by some corroborating circumstances against some conflict in the oral testimony of the subscribing witnesses.

With what has been said, we may pass the question of whether the finding objected to has sufficient support in the evidence without definitely deciding the matter, since we have concluded that the order of signing is not vital, where that of the testator and that of the witnesses occur, as in the particular instance, when all are present and as part of a transaction then occurring in its entirety. This court does not appear to have directly passed upon that question, though it has been referred to in previous cases,—*Lewis's Will, supra; Allen v. Griffin,* 69 Wis. 529, 35 N. W. 21. Some courts have held to the contrary, but, generally, under statutes somewhat different than ours, and, in effect, giving undue dignity to mere formality.

As indicated by the quotation from the statute, it does not expressly require that the testator shall first sign and then the witnesses "attest and subscribe" though it is, doubtless, the better and the ordinary way. The regulations in the written law are for the purpose of conserving the inherent right to dispose of property by will. Like all such regulations, they should be administered so as to effect their purpose, not in such technical way as to involve unnecessary difficulties in the enjoyment of the testamentary right and so as to be liable to operate to the destruction of it though the intention of the testator be clear. Mere informality, where

the essentials required are substantially satisfied, is immaterial.

The foregoing has ample support in the general treatment of the subject of the execution of wills under our statute, in the decisions of this court to which we have referred, and by decisions upon the precise point in courts elsewhere referred to by counsel for respondent. *Horn's Estate,* 161 Mich. 20, 125 N. W. 696; *Limbach v. Bolin* (Ky.) 183 S. W. 495; *Kaufman v. Caughman,* 49 S. C. 159; *Gibson v. Nelson,* 181 Ill. 122, 54 N. E. 901; *Rosser v. Franklin,* 6 Gratt. (Va.) 1; *Miller v. McNeill,* 35 Pa. St. 217, 222; *O'Brien v. Galagher,* 25 Conn. 229; *Cutler v. Cutler,* 130 N. C. 1, 40 S. E. 689; *Shapter's Estate,* 35 Colo. 578, 85 Pac. 688; *Silva's Estate,* 169 Cal. 116, 145 Pac. 1015, 1017.

The state of the law on the subject discussed is well stated in 40 Cyc. at page 1127, referring to a long line of authorities:

"The rule obtaining in England and some of the United States is that it is indispensably necessary to the valid execution of a will that the signature of the witnesses be affixed subsequent, in point of time, to that of the testator; while the rule prevailing in other jurisdictions is that, in the absence of an express statutory requirement that the witnesses must sign after the testator, the fact that part or all of them sign before is immaterial when all are present at the same time and their acts are part of one continuous and complete transaction."

That the rule is as above indicated, in England, and is followed in jurisdictions in this country where the distinction between the nature of the testamentary right, in the former, and in the latter, is not appreciated, is most natural. In England there is no testamentary right, strictly so called. There is only a testamentary privilege, while here there is such right,—one of inherent character, protected by the fundamental law, and regulated by statute for the purpose of

reasonable exercise and conservation. *Will of Dardis,* 135 Wis. 457, 115 N. W. 332; *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627; *Will of Rice,* 150 Wis. 401, 445, 446, 136 N. W. 956, 137 N. W. 778.

In view of the nature of such right as recognized here, the purpose and the letter of the statute, and especially the weight of authority in this country, we unhesitatingly hold that, where the signatures of the witnesses and the testator form parts of one continuous transaction and all actors are present from first to last, the mere order of affixing the signatures is not vital to the validity of a will; though, as before stated, the orderly and far the better way is for the signature of the testator to precede in time the signature of the witnesses.

The next suggestion made is that the testatrix did not know or understand the contents of the instrument. That seems to be involved in the next point made that she was not of testamentary capacity, and the last one, that she acted under undue influence exercised by her sister. All those matters are specifically covered by the findings of fact which are amply sustained by the evidence.

These features of the evidence fully warranted the findings. There was an entire absence of any showing that Mrs. Griffith was susceptible to undue influence, or that there was any opportunity for, or disposition to exercise such influence by her sister or any one else. Then there is the undisputed evidence that the idea of making the will was solely that of the testatrix and that she carried it out without suggestion from, or consulting with, any one; that she directed the person who did the writing for her, using paper and pencil which were conveniently at hand, to act in the matter, and such person then wrote, in the testatrix's presence and in absence and without knowledge of any other person, at her dictation, what appears in the body of the instrument; that later, at her request, the paper was produced, all persons were excluded by her from the room except the one who had prepared the

writing and Father Palmer, the priest whom she had requested to be present, and then that execution of the instrument occurred and it was given by her to Father Palmer with express, definite, and proper directions as to what to do with it. All these circumstances evince clearly an intelligent formation of a purpose, uninfluenced by any one and a like execution of it. The fact that the lot devised was referred to for a description with the addition of the word "acres" is not material. The particular property intended is without question. There is nothing unreasonable about the disposition of property because it was left to the sister while there were several minor children and a husband of whom the testatrix was very fond.

The manner in which the property was willed is satisfactorily explained by the facts that the latter was possessed of an ample fortune and of good prospects for the future; that the beneficiary was an only sister to whom the testatrix was warmly attached and who was alone in the world, quite along in years, and of a very meager means of support; and the further circumstance that the lot devised, and one owned by the sister, adjoined and were occupied by a building, the whole having formerly belonged to the mother from whom each derived her interest. It was quite natural that the testatrix should have considered that her part should go to the sister and the former entirety be restored instead of the latter being left in danger of having to deal with a stranger.

There is no reason, as we view the case, why any costs or allowance should be made to the guardian *ad litem* under sec. 4041*a* or sec. 4041*b*, Stats., and therefore none will be allowed in this court, but such guardian and those he represents may well be protected from being burdened with costs notwithstanding the failure of the appeal. It is within the power and according to the practice of the court to do that where justice seems to require it.

By the Court.—The judgment is affirmed. No costs or

allowance is made to either side in this court, but the respondent is required to pay the clerk's fees; this disposition not to prejudice the competency of the circuit court or probate court, having jurisdiction of the administration of the estate, to make such allowance for costs and expenses incurred by the proponent in establishing the will as such court may deem just, payable out of the estate or otherwise.

A motion for a modification of the judgment so as to allow to the guardian *ad litem* a reasonable sum for his services and disbursements on the appeal, payable out of the estate, was denied on June 12, 1917.

JACOBY, Administratrix, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

February 15—June 12, 1917.

Railroads: Liability for death of employee: Federal statute: Interstate commerce: Fences: Statute construed: Where fence is required: Main tracks and switchtracks: Evidence: Appeal: Directing final judgment: Assumption of risk: Damages: Instructions to jury: Harmless error.

1. In order that an action for the death of a railway employee shall come within the federal statute it must appear that at the time of the accident both the carrier and the employee were actually engaged in interstate commerce.

[2. Whether a car clerk in the receiving department of a railway company while employed in the yards in and around the car shops in checking over and keeping account of the cars loaded with company material, many of which cars were received from, and others consigned to, points outside the state, is engaged in interstate commerce, is not determined.]

3. Where such clerk, after having completed all his duties and having left the last place where any of his duties were to be performed, was struck and killed by an engine as he was leaving the railway premises without any immediate intention of returning, he was not, just at the time of the accident, engaged in interstate commerce.

4. Sec. 1810, Stats.,—which makes a railway company absolutely liable for all damages occasioned by its failure to fence its road as therein required,—is for the benefit of railway employees as well as for the general public, and is applicable in the case of an employee who was killed while leaving the railway premises.
5. Under said sec. 1810 the duty of a railway company to fence both sides of any portion of its road except depot grounds and places where, as provided in sub. 4, the proximity of ponds, lakes, watercourses, ditches, embankments, etc., renders a fence unnecessary, is absolute; and this court has not recognized the rule (adopted in certain jurisdictions) under which other exceptions may be read into the statute.
6. One of defendant's civil engineers having upon the trial identified as accurate and complete a blue-print map of the premises at and surrounding the place of the accident which disclosed no fence south of defendant's sidetracks, and neither such engineer nor any other witness having testified as to the existence of any fence opposite the place of the accident, it is *held* that there was no showing in the record of an attempted compliance by the defendant with sec. 1810.
7. Ten feet south of defendant's east-bound main track is a sidetrack about a mile and a half long, known as switchtrack No. 1, connecting at each end with said east-bound track. South of this track No. 1 and connected with it at the east end are nine or more parallel switchtracks of varying length, used largely in connection with defendant's car shops. Plaintiff's intestate was struck and killed by a switch engine on the east-bound main track, just after he had crossed switchtrack No. 1 by climbing over the bumpers between stock cars which were standing on that track. *Held*, that to sustain a judgment for plaintiff on the ground that defendant had failed to comply with sec. 1810, Stats., it must appear that the statute required a fence between the east-bound main track and switchtrack No. 1, since the absence of a fence anywhere else could not be said to have occasioned in whole or in part the death of the intestate.
8. It appearing, by the uncontradicted evidence, that said switchtrack No. 1 was used as a track on which cars, after being repaired in the shops, were placed in order that they might be taken off by a switch engine and put into the regular transportation business of the defendant, said track cannot be considered merely as a part of an industrial plant (the car-shop system) but must be held a part of defendant's "road," as that word is used in sec. 1810, Stats.; and hence no fence was required by law between said track No. 1 and the east-bound main track.
9. It being conceded by both parties that upon a second trial there

could be no change in the testimony as to the use of said track No. 1, a final judgment dismissing the complaint is directed.

10. An employee of a railway company continuing in such employment with a knowledge of the fact that the road is unfenced does not thereby assume the risk or waive his right, under sec. 1810, Stats., to recover for injuries occasioned by the want of such fence.

11. In an action for the death of a railway employee it was error to instruct the jury that the damages they might assess could not exceed $10,000; but, the trial court having reduced their award to $7,000, the error in the instruction would not of itself warrant a reversal.

12. Although in such case the recovery is limited to the pecuniary loss of the wife, evidence as to the number and ages of the children of the deceased was properly admitted.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

The appeal is from a judgment in favor of the plaintiff.

The action was brought to recover damages for the death of plaintiff's husband, an employee of the defendant.

At the place of the accident, which is about three or four hundred feet west of Merrill Park passenger depot in Milwaukee, are the two parallel main tracks of the defendant, the one to the south being the east-bound. At a distance of about ten feet to the south of the east-bound track was a sidetrack about a mile and a half long, connecting at the east and west ends thereof with the main track by a switch and known as Merrill Park track 1. To the south of this sidetrack were nine or more parallel switchtracks of varying length connected at the east end with this track 1. To the south and west of the place in question are the roundhouses and car shops of the defendant company, and to the south and east of Merrill Park station are the foundry and machine shops of the Falk Company. The car shops are quite extensive, covering a large number of different shops and a large number of tracks substantially all connecting with the main tracks or the tracks above specified. About 700 feet west of the Merrill Park station and therefore several hundred feet beyond the place

of the accident was a roadway through the car-shop yard and over the tracks in question, which roadway was maintained by the defendant and used to a large extent by employees in crossing these tracks. Flagmen were stationed there at certain hours of the forenoon and evening when there were a large number of employees so crossing, to give warning of trains to such employees. Numbers of employees also crossed these tracks at all points other than this roadway.

The deceased had worked for the defendant at the car shops for ten or twelve years as a clerk in the receiving department, but for the four or five months before he was killed he had been employed as car clerk in the same department. His duties as such required him to go to and from the storehouse, situated some distance to the south and west of the place of the accident, and to go through the yards and shops of the defendant in that neighborhood and ascertain the numbers of the cars and the material therein of cars coming and going from both within and without the state of Wisconsin, loaded with material that belonged to and was used by only the railroad company itself. He kept a record of the time when, and the numbers of the cars unloaded with such material and the total amount on tracks at the time. He would also seal cars loaded with such material to be shipped to points without the state of Wisconsin and place cards on the same showing the switchmen where such cars were to be switched and doing the same to the cars going to different shops in that yard. The cars with which he was concerned were loaded with materials such as lumber, steel, iron, etc., used for car and engine building and repairing, also general supplies for the railroad and machinery for the shops.

On August 5, 1912, the day preceding his death, the deceased had obtained a leave of absence for the 6th of August to attend to some private business at Port Washington, Wisconsin, with the understanding that he was to go to the yards early in the morning of the 6th and make up his report of the

cars standing on the tracks as required by his employment. It appears that on the morning of August 6th he did examine and make up a list of such cars and left the report of the same at the storehouse as customary. Upon completion of his duty in connection with such report he left the storehouse, went in a northeasterly direction east of the roadway above specified and across the sidetracks that have been described as lying south of the place of the accident.

On Merrill Park switchtrack No. 1 were a number of stock cars standing unattached to any locomotive. He was last seen before the accident in the act of climbing between two of these stock cars and jumping over the bumpers into the ten-foot space between this sidetrack and the east-bound main track. From there he went immediately to the north and upon the east-bound main track and was struck and instantly killed by a switch engine backing east on that main track at a speed of five to six miles an hour.

The complaint alleged violation by defendant of the provisions of sec. 1810, Stats., in that the defendant failed to inclose its right of way and had carelessly omitted the construction of fences and guards required by the provisions of said section. It also alleged that the deceased was at the time of the accident lawfully leaving the defendant's premises where he was employed in interstate commerce, and demanded judgment for $25,000.

The answer, among other things, denied that the deceased was on the day in question in the employ of or rendering services to the defendant, or any carelessness on its part causing his death, and alleged that the death was caused by the carelessness and negligence of deceased himself, and further denied that at the time he was killed he was engaged in interstate commerce, but during the trial the defendant was allowed to amend by alleging that deceased was at the time of the injury so engaged.

At the commencement of the trial the plaintiff moved to

amend the complaint by alleging that the deceased was in intrastate and not in interstate commerce. It does not appear that any ruling was had upon this motion, but during the trial the plaintiff offered in evidence the paragraph of the answer quoted above denying that at the time of the accident the deceased was engaged in interstate commerce, and thereupon defendant moved to amend the answer by withdrawing that allegation, which amendment was allowed by the court, but the statement in the answer was received in evidence. The court permitted the plaintiff, over objection by defendant, to prove the number and ages of the children of deceased surviving him.

A special verdict was submitted to the jury in three questions, by the first of which the jury found that the premises where deceased was killed were not a part of defendant's depot grounds; and by the second that the death was occasioned in whole or in part by the want of a fence between the track on which he was killed and the first track south thereof; and by the third question that the financial loss sustained by plaintiff as the result of her husband's death was $10,000.

In the charge to the jury on the third question the court said: "The damages in a case of this kind are restricted to the pecuniary loss sustained by the widow, and under the statutes the damages which you assess cannot exceed the sum of $10,000."

Upon motions duly made after verdict the court made a written decision wherein, among other things, he stated that the series of ten tracks, including Merrill Park No. 1, which have been described above, "were used solely in connection with the defendant's plant for temporarily storing cars before and after repairing them in the shops;" that at the place of the accident there is no siding or switchtrack actually used in connection with the movement of freight or passenger trains along those two tracks; that the deceased was chargeable with contributory negligence so that recovery could only

be had upon the theory that sec. 1810 required the defendant to maintain a fence to the south of the track in question. He reached the conclusion that the statute required the defendant to maintain a fence between the track on which Jacoby was killed and the first track south thereof; that the damages were excessive and should be reduced to $7,000; and upon plaintiff's election to so remit judgment was directed in favor of the plaintiff, from which judgment the defendant appeals.

For the appellant there was a brief by *C. H. Van Alstine* and *H. J. Killilea,* both of Milwaukee, and oral argument by *Mr. Killilea.*

For the respondent there was a brief by *William F. Schanen* of Port Washington, attorney, and *James D. Shaw* of Milwaukee, of counsel, and oral argument by *Mr. Shaw.*

The following opinion was filed March 13, 1917:

ESCHWEILER, J. The questions presented on this appeal are four: (1) Was the deceased at the time of the accident engaged in interstate commerce? or, (2) If not a case subject to the federal law, did the provisions of sec. 1810, Stats., the so-called fencing statute, apply, and was it rightly applied under the facts in this case by the trial court? (3) Was there reversible error in the charge of the court or (4) in the admission of evidence as to the children of the deceased?

No issue is raised by plaintiff on the point that if the deceased was at the time of the accident engaged in interstate commerce the federal law would apply and there would be no liability, and citation of cases therefore is unnecessary.

In a case of this kind, in order that it shall come within the purview of the federal statutes, it must appear that at the time of the accident both the carrier and the employee were actually engaged in interstate commerce. *Shanks v. D., L. & W. R. Co.* 239 U. S. 556, 560, 36 Sup. Ct. 188; *Zavitovsky v. C., M. & St. P. R. Co.* 161 Wis. 461, 154 N. W. 974.

Whether the general employment of the deceased in the

yards of the defendant in and around its car shops in checking over and keeping account of the cars loaded with material belonging to defendant itself, many of which cars were received from and others consigned to points outside of the state of Wisconsin, brought him within the rule of such cases as *St. Louis, S. F. & T. R. Co. v. Seale,* 229 U. S. 156, 159, 33 Sup. Ct. 651, is not necessary to be and is not determined in this case.

It appears from the uncontradicted testimony that the deceased had completed all of the operations required of him in the discharge of his duty to the defendant. He had turned in his report to the office and had left the last place at which any of his duties were to be performed and was free to go from that point in whatever direction he should choose without being under any further obligation to the defendant so far as his employment was concerned. We hold, therefore, that as this accident happened while he was so leaving the premises of the defendant without any immediate intention of returning to complete any of his duties, he was not, just at the time he met his death, engaged in interstate commerce. This case, therefore, is easily distinguished from *North Carolina R. Co. v. Zachary,* 232 U. S. 248, 260, 34 Sup. Ct. 305, where a fireman, after attending to his engine, was killed on crossing the track on his way to his boarding house, preparatory to returning to his engine for an interstate trip.

On the second proposition, relating to the application of sec. 1810, Stats., it is urged that, the deceased being an employee of defendant and in the act of leaving instead of going upon its premises, his case does not present one within the scope or purpose of the statute. This court, however, has directly held in the two cases of *Quackenbush v. Wis. & M. R. Co.* 62 Wis. 411, 22 N. W. 519, and 71 Wis. 472, 37 N. W. 834, that the statute is for the benefit of the employee of a railroad while thereon as well as for the general public, and we see no reason for altering that view of the statute. The

same principle has been adopted in other jurisdictions, as seen in the cases of *Dickson v. O. & St. L. R. Co.* 124 Mo. 140, 27 S. W. 476, 25 L. R. A. 320; *Donnegan v. Erhardt,* 119 N. Y. 468, 23 N. E. 1051, 7 L. R. A. 527; *Atchison, T. & S. F. R. Co. v. Reesman,* 60 Fed. 370, 23 L. R. A. 768.

The wording of sec. 1810, Stats., indicates that the duty is absolute of fencing both sides of any portion of its road except depot grounds and where the proximity of ponds, lakes, watercourses, ditches, etc., renders a fence unnecessary. *Schwind v. C., M. & St. P. R. Co.* 140 Wis. 1, 121 N. W. 639; *Ulicke v. C. & N. W. R. Co.* 152 Wis. 236, 139 N. W. 189; *Bejma v. Chicago & M. E. R. Co.* 160 Wis. 527, 149 N. W. 588, 152 N. W. 180; *Trojanowski v. C. & N. W. R. Co.* 163 Wis. 76, 157 N. W. 536.

This court has not recognized the rule adopted in certain jurisdictions of reading into the statutes exceptions other than those specified in the statute itself, as for instance where a construction of a fence and cattle-guard would seem to be an increased danger to human life, as in *Burnham v. C., B. & Q. R. Co.* 83 Neb. 183, 119 N. W. 235; *Mattes v. G. N. R. Co.* 95 Minn. 386, 104 N. W. 234, 235.

That a railroad company is so situated that its tracks are in close proximity to the tracks of other railroad companies, making it inconvenient or dangerous to fence the same, cannot exclude liability under a similar statute. *Kelver v. N. Y. & St. L. R. Co.* 126 N. Y. 365, 27 N. E. 553.

It is urged on argument that a fence had been erected in compliance with the statute to the south of all of these ten or twelve sidetracks opposite the place of accident. One of defendant's civil engineers was called and identified as accurate and complete a blue-print map of the premises at and surrounding the place of the accident, but no fence is disclosed on such map nor did such engineer testify as to the existence of any. The only evidence on this point was that of one Chorinski, a section foreman, but an examination of

his testimony discloses that the fence which he says at one place in his testimony was south of the tracks was a fence that had been erected by the Falk Company surrounding their plant to the south and east of the place of the accident. There is therefore no showing in the record of an attempted compliance by the defendant with sec. 1810.

To sustain a judgment for plaintiff in this case it must appear that defendant, under sec. 1810, was required to place a fence between the east-bound main track and switchtrack No. 1 just south of it. For, under the facts here presented, it is not contended by plaintiff that the absence of a fence anywhere else could be said to have occasioned in whole or in part the death of Jacoby.

Appellant contends that this track No. 1 is a part of its main railroad system and that it is used as a sidetrack for storing completed or repaired cars or engines preparatory to their being switched directly from there onto the main track to become a part of the general traffic; that such cars and engines are in effect put into transportation while there awaiting such use; that an engine comes daily and switches them from that track onto the main line.

The respondent contends that this sidetrack No. 1 as well as the ten or twelve tracks to the south of it are all parts of the car-shop system of defendant and as such to be treated as an industrial plant, separate and distinct from its transportation system, as much so as though the car shops were owned or operated by an independent company.

An examination of the testimony in the record on this controlling feature of the case satisfies us that it is not sufficient as it now stands to support the conclusion arrived at by the learned trial court in holding that a fence should have been erected between the main track and switchtrack No. 1. The testimony is indefinite and uncertain as to whether or not the use made of track No. 1 for storing cars and engines after they had left the shops was peculiar to that track or whether

the same use was not made of the tracks to the south of No. 1. If these ten or twelve tracks are all used alike and as a unit for transportation purposes, then the fence could not have been required between track No. 1 and the main track, or, if track No. 1 alone was a part of the transportation system, then still the fence could not have been required north of track No. 1; while if track No. 1 is properly to be considered as a part of the defendant's industrial plant, then under the facts as here presented it may be held that compliance with the absolute terms of sec. 1810 requires such fencing at the point indicated by the trial court.

The trouble, however, with the present judgment is that the evidence is not sufficient to support the finding of the trial court in that regard.

From the testimony of Mr. Gregg, chief dispatcher of the Milwaukee shops, on his direct examination the following questions and answers were had:

"*Q.* Now what are the *tracks* immediately south of the east-bound track used for? *A.* For company material and repair cars and cars that have been repaired and cars ready to be shipped out to different points on the road. *Q.* Are cars moved on that *track?* *A.* They are."

He also testified that the tracks parallel with and south of this No. 1 were numbered consecutively and that there was a lead or switch off of No. 1 track that connects all the others to the south. Again:

"*Q.* And the *track* No. 1 south of the main track was used for what? *A.* For cars that was ready for shipment, that was repaired and ready to go out on the road. *Q.* Sort of storage cars? *A.* For the time being." There was a switch engine came daily and switched the cars to different yards for different destinations. "*Q.* That is, that was the place where you put the repaired product from your factory, from your shops? *A.* Yes, sir. *Q.* Cars came there? *A.* Ready for shipment. *Q.* And when they are fixed up you put them out on track No. 1? *A.* Yes. *Q.* It is not used as a passing

track for freight? *A.* No, sir. *Q.* Not used for traffic? *A.* No, sir. *Q.* But merely as a place—shelf—where you put the cars after you fix them up? *A.* Yes, sir."

So it will be noted that in one place he gives the general use of these *tracks* and then again he speaks only of *track* No. 1, so that it cannot be fairly said one way or the other as to whether there is in fact any difference in the use of these several tracks, which is a vital question in the case.

After the close of the testimony plaintiff asked leave to reopen the case for the purpose of showing that there had been owned and operated by the defendant a line or road along what are designated the main tracks before the existence of the shops, and that the combination of tracks and structures south of the main tracks was subsequently located and constructed by the defendant, and also offered to show the width of the original line or road. This offer of testimony was rejected by the court. This testimony may become material in determining the important question as to the real status of track No. 1.

It is essential, therefore, before it can be held that the absence of a fence was responsible for the death of Jacoby, that it shall be determined by the jury or court whether the contention of plaintiff as to the location of the fence is supported by the actual facts, and the case must be sent back for a new trial for that purpose. *Zavitovsky v. C., M. & St. P. R. Co.* 161 Wis. 461, 154 N. W. 974. If that be found, then the jury may properly be required to consider the second question of the special verdict, as to whether or not the absence of the fence occasioned in whole or in part the death of Jacoby under the rule laid down by this court in the case of *Trojanowski v. C. & N. W. R. Co.* 163 Wis. 76, 157 N. W. 536. The facts in this case do not bring it within the rule of *Vaillant v. C. & N. W. R. Co.* 163 Wis. 548, 158 N. W. 311, relied upon by appellant.

It is urged by appellant that, even if it be found that

Jacoby's death was due to the want of a fence under sec. 1810, nevertheless he, being an employee of defendant at the time of the accident and, as it must be presumed from the evidence, familiar with the situation, is chargeable with the assumption of such risk growing out of his employment, and that thereby his right to recover would be defeated. This question of assumption of risk under sec. 1810 was squarely before the court in the case of *Quackenbush v. Wis. & M. R. Co.* 62 Wis. 411, 22 N. W. 519; *S. C.* 71 Wis. 472, 37 N. W. 834, and it was there held that an employee of a railroad company continuing in such employment with knowledge of the fact that the road is unfenced does not thereby waive his right to recover for injuries occasioned by the want of such fence. The absolute nature of such statutes has been repeatedly passed upon by this court. *Randall v. M., St. P. & S. S. M. R. Co.* 162 Wis. 507, 513, 156 N. W. 629; *Alexander v. M., St. P. & S. S. M. R. Co.* 156 Wis. 477, 146 N. W. 510; *Ulicke v. C. & N. W. R. Co.* 152 Wis. 236, 139 N. W. 189; *Schwind v. C., M. & St. P. R. Co.* 140 Wis. 1, 121 N. W. 639.

And this question of any assumption of risk by the deceased may also be disposed of in the negative on the theory that this statute, being held as it is for the general protection of human life, gives an employee who is a member of the general class sought to be protected the same benefit as one outside of such employment; and as to such outsider there is no doctrine of assumption of risk. *Knauer v. Joseph Schlitz B. Co.* 159 Wis. 7, 12, 149 N. W. 494; *Conrad v. Springfield R. Co.* 240 Ill. 12, 17, 88 N. E. 180, 182, 130 Am. St. Rep. 251; *Chicago & E. I. R. Co. v. Randolph,* 199 Ill. 126, 65 N. E. 142.

The statement by the court in its charge to the jury that the damages they might assess could not exceed $10,000 was error under the rule in *Otto v. M. N. R. Co.* 148 Wis. 54, 60, 134 N. W. 157. In view of the fact, however, that the dam-

ages were reduced by the court from $10,000 to $7,000, this would not warrant us in reversing the case on the point of this instruction alone.

The objections to the testimony of plaintiff as to the number and ages of the children of deceased were properly overruled. *Hamann v. Milwaukee B. Co.* 136 Wis. 39, 46, 116 N. W. 854.

By the Court.—It is ordered that the judgment of the circuit court be reversed and a new trial granted.

The following opinion was filed June 12, 1917:

WINSLOW, C. J. Respondent moves for a rehearing and urges that if, under the testimony in the record, the court is convinced that track No. 1 was used for railway rather than for industrial purposes, the court determine that fact now and not send the case back for another trial. In support of this position respondent says that the proof concerning the use of this track is clear and conclusive, that no more complete evidence could be produced upon another trial, hence that another trial would be a useless expenditure of time and money.

This contention is evidently advisedly made by counsel who are fully cognizant of its importance and of its effects, and we have concluded to act upon it. Certainly it is no kindness to either party to order a new trial when all the facts are already before the court as fully as they could be brought out on another trial.

It was said in the former opinion that "To sustain a judgment for plaintiff in this case it must appear that defendant, under sec. 1810, was required to place a fence between the east-bound main track and switchtrack No. 1 just south of it." This was based upon our conclusion that there was no evidence on which it could be found that Jacoby entered on the danger zone at any particular place except the point

where he climbed over the bumpers and between the stock cars standing on track No. 1.

It was stated in this connection that respondent did not contend that the absence of a fence anywhere else could be said to have caused Jacoby's death, and this latter statement is challenged by respondent's counsel on this motion.

We do not, however, have occasion to consider this challenge now, as we are still convinced that in order to sustain plaintiff's claim it must appear that a fence was required by sec. 1810 between the east-bound main track and track No. 1.

The uncontradicted evidence shows that track No. 1 was parallel with and next to the main track and was used as a track on which cars, after being repaired, were placed in order that they might be taken off by a switch engine and put into the regular transportation business of the company. The court is still of the opinion that under these facts track No. 1 cannot be considered merely as a part of the industrial plant, but must be held a part of defendant's "road" as the word is used in sec. 1810 of the Statutes.

This conclusion makes it certain that no fence was required by law between track No. 1 and the main track, and hence that there was no ground for a recovery. As it is conceded all around that there could be no change in the testimony as to the use of track No. 1 on a second trial, final judgment should now be ordered.

The mandate will therefore be amended so as to read: "Judgment reversed, and action remanded with directions to dismiss the complaint on the merits."

By the Court.—The mandate is amended as indicated in this opinion, and motion for rehearing denied in all other respects without costs.

SIEBECKER, KERWIN, and ESCHWEILER, JJ., dissent.

HENRY, Appellant, vs. CITY OF LA CROSSE and others, Respondents.

March 16—June 12, 1917.

Viaduct over railway tracks: Construction by order of railroad commission: When abutting owners entitled to damages: Street railway not an additional burden: Municipal corporations: Change of grade of street.

1. The state railroad commission has power to order the construction of a viaduct by a railway company over its tracks, and such company has the right to construct it in compliance with such order.
2. Extension of the tracks of a street railway company over such viaduct and operation of its cars thereon do not constitute an additional burden entitling abutting property owners to damages.
3. A provision in the order of the commission to the effect that the city in which the viaduct was to be built should "assume responsibility for any alleged damage to adjacent property or business caused by the issuance or enforcement of this order, or by the proper prosecution of the work," did not create or attempt to create any liability to abutting owners for change of grade, other than that provided by law.
4. Where a change of the grade of a street is made by authority of law and with due care the municipality making the change is not liable for consequential injury to abutting lots, unless expressly made so by statute or the constitution.
5. The grade of a street was established by city ordinance in 1883, and a viaduct was constructed over railway tracks in the street, but not at the exact grade then established. In 1913 the old viaduct was torn down and a new one was constructed, pursuant to an order of the railroad commission, at the grade established by the ordinance of 1883, which had never been changed and was at this time reaffirmed by ordinance. *Held*, that the new viaduct was built on a "permanently established grade," within the meaning of sec. 925—172, Stats. (which section the city had in the meantime adopted), and hence that there was no liability to abutting property owners although it was not built on the same grade as the old viaduct.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

This is an appeal to the circuit court from the determination of the board of public works and the common council of the city of *La Crosse* awarding damages to abutting owners on account of the construction of a viaduct over the tracks of the *Chicago, Milwaukee & St. Paul Railway Company* on Rose street in said city in accordance with an order of the railroad commission of Wisconsin.

After the case was appealed to the circuit court the *Chicago, Milwaukee & St. Paul Railway Company* and the *Wisconsin Railway, Light and Power Company,* owner of the street railway, were impleaded as defendants. There were general objections to the jurisdiction of the court. The pleadings were changed and amended so as to charge one or all of the defendants in the matter with damages to abutting owners. The question of plaintiff's damages was submitted to the jury and they found $350.

The court found as follows:

"(1) That the city of *La Crosse* is a municipal corporation and that the *Chicago, Milwaukee & St. Paul Railway Company* and the *Wisconsin Railway, Light and Power Company* are railroad corporations organized and operating under the laws of the state of Wisconsin.

"(2) That Rose street is a public street in the city of *La Crosse,* Wisconsin, running north and south in the city of *La Crosse,* and that the *Chicago, Milwaukee & St. Paul Railway Company* maintains and operates a system of main and side tracks through this city, intersecting Rose street.

"(3) That in the year of 1883, because of the danger incident to the crossing of defendant's tracks with Rose street at grade, the city of *La Crosse* entered into an agreement with the defendant *Chicago, Milwaukee & St. Paul Railway Company* by which said company undertook to erect and maintain a viaduct over its tracks at Rose street upon condition that the city construct and maintain the approaches thereto, and pursuant to such agreement a viaduct was in fact so constructed.

"(4) That preliminary to the construction of such viaduct the city of *La Crosse,* by an ordinance duly adopted, established the grade upon Rose street from Gould street on the

south to Hagar street on the north, in terms and figures as follows, to wit:

Center line of Gould street	48 feet
Center line of Island street	64.10 feet
Sixteen feet south of south line of right of way of Chicago, Milwaukee & St. Paul Railway	69.19 feet
Sixteen feet north of line of right of way of Chicago, Milwaukee & St. Paul Railway	69.19 feet
Center of Hagar street	53.50 feet
Center line of St. Andrew street	66.25 feet

"(5) That upon the construction of such viaduct in 1883 the approaches thereto were not in fact built upon the grade so established by the city of *La Crosse,* but upon a short, sharp grade, leading to the floor of such viaduct.

"(6) That in 1912 such original viaduct became dangerous and unsafe for public travel, and by order of the railroad commission of Wisconsin it was condemned and Rose street closed to travel, but thereafter in November, 1913, the railroad commission ordered the construction of a new viaduct, in accordance with plans and specifications approved by the railroad commission, which apportioned the expense of construction between the parties defendant as follows:

"Sixty per cent. to be paid by the *Chicago, Milwaukee & St. Paul Railroad Company;*

"Twenty-five per cent. to be paid by the city of *La Crosse;*

"Fifteen per cent. to be paid by the *Wisconsin Railway, Light and Power Company.*

"(7) That such new viaduct and its approaches were thereupon constructed by the defendant *Chicago, Milwaukee & St. Paul Railway Company,* in accordance with said plans and specifications, and the approaches thereto, pursuant to said plans, were built upon the grades established for Rose street by the city of *La Crosse* in 1882, as hereinabove found, except that such approaches do not occupy the entire width of the street, but leave a roadway nine feet wide, level with the abutting property, on each side of said approaches between it and the curbs of Rose street.

"(8) That by direction of the railroad commission of Wisconsin in its order of November, 1913, the city of *La Crosse* instituted proceedings to assess the damages claimed to result to abutting property by reason of the building of such viaduct, and although said city disclaimed any liability it conducted

proceedings to determine such damages as for a change of the grade of Rose street at the expense of abutting property, as a result of which amounts were conditionally allowed to the property owners by the city of *La Crosse,* and from the particular conditional award to the plaintiff herein said plaintiff, *Nettie Henry,* has appealed to this court.

"(9) That Rose street has never been improved at the expense of abutting property.

"(10) That at no time prior to the construction of the new viaduct in 1913 has Rose street been graded to the established grade."

The court concluded:

"(1) That by the construction of the new viaduct the grade at Rose street has not been changed.

"(2) That the defendants are entitled to judgment in their favor upon the merits of this action, notwithstanding the verdict of the jury."

Judgment was entered accordingly, from which this appeal was taken.

Frank Winter of La Crosse, for the appellant.

Jesse E. Higbee of La Crosse, for the respondent *City of La Crosse.*

For the respondent *Chicago, Milwaukee & St. Paul Railway Company* there was a brief by *Paul W. Mahoney* of La Crosse and *C. H. Van Alstine* and *H. J. Killilea,* both of Milwaukee, and oral argument by *Mr. Mahoney.*

For the respondent *Wisconsin Railway, Light and Power Company* there was a brief by *George H. Gordon, Law & Gordon* of La Crosse, and oral argument by *George H. Gordon.*

The following opinion was filed April 4, 1917:

KERWIN, J. It appears without dispute that the railroad of the defendant *Chicago, Milwaukee & St. Paul Railway Company* was constructed at grade across Rose street in the city of *La Crosse* in 1856. Mill street is parallel and ad-

jacent to Rose street. Each of these streets is and was for a long time prior to 1882 covered by a network of railroad tracks. In 1883 a viaduct was built by authority of law at the Rose-street crossing of defendant *Chicago, Milwaukee & St. Paul Railway Company.* So for more than thirty years prior to the building of the new viaduct in 1913 there had been a separation of grades at Rose street, the floor of the viaduct being about twenty-two feet above the level of the railroad tracks and reached by abrupt paved approaches in Rose street. In 1913, on account of accidents at the Mill-street grade crossing, the railroad commission of Wisconsin duly ordered that the street railway tracks be removed from Mill to Rose street; that a new viaduct be constructed in place of the old Rose-street timber structure and the street railway tracks built over it. The order of the railroad commission further provided that the defendant *Chicago, Milwaukee & St. Paul Railway Company* should construct the new viaduct in accordance with approved plans. The approaches to the floor of the new viaduct are less abrupt and longer than those of the old viaduct, although the floor of the new viaduct is on the same level as that of the old structure.

The order of the railroad commission provided for the apportionment of the expense of construction and maintenance of the new viaduct, and pursuant to this order the defendant *Chicago, Milwaukee & St. Paul Railway Company* tore down the old structure and erected the new with longer, paved approaches. A nine-foot roadway is left on each side of the approaches at the same level as the abutting property. The approaches are claimed by plaintiff to be an additional burden.

The railroad commission ordered that the defendant city pay damages which might result from the work of the new structure. While the city disclaimed any liability for damage to abutting owners, it went through the form of ascertaining the same, but expressly refused to pay any damages

to abutting owners on the ground, among others, that the building of the viaduct did not result in the change of a permanently established grade.

No part of the expense of the viaduct was charged to abutting owners. The grade was established by ordinance in 1883 when the first viaduct was built and never changed, as found by the court below. All the findings are well supported, and we shall spend no time discussing the evidence.

The main question involved is whether any of the defendants is liable for damages to abutting property on account of the construction of the viaduct.

The court below held that, since there was no change of an established grade by the construction of the viaduct, the abutting owners were not entitled to damages against any of defendants.

The railroad commission of the state of Wisconsin had power to order the construction of the viaduct and the defendant *Chicago, Milwaukee & St. Paul Railway Company* the right to construct it in compliance with the order of the railroad commission. *Milwaukee v. Railroad Comm.* 162 Wis. 127, 155 N. W. 948. The extension of the track of defendant *Wisconsin Railway, Light and Power Company* over the right of way and operation of cars thereon was not an additional burden, hence did not entitle the abutting owners to damages. *La Crosse City R. Co. v. Higbee,* 107 Wis. 389, 83 N. W. 701; *Hobart v. Milwaukee City R. Co.* 27 Wis. 194; *Younkin v. Milwaukee L., H. & T. Co.* 120 Wis. 477, 98 N. W. 215.

It is a well settled rule that where a change of grade is made by authority of law and with due care the municipality making the change is not liable for consequential injury to abutting lots, unless expressly made so by statute or the constitution. *Drummond v. Eau Claire,* 85 Wis. 556, 55 N. W. 1028; *Colclough v. Milwaukee,* 92 Wis. 182, 65 N. W. 1039;

Harrison v. Milwaukee Co. 51 Wis. 645, 8 N. W. 731; *Liermann v. Milwaukee,* 132 Wis. 628, 113 N. W. 65.

It is clear that the provisions in the order of the railroad commission providing for the building of the viaduct to the effect that the defendant city should "assume responsibility for any alleged damage to adjacent property or business caused by the issuance or enforcement of this order, or by the proper prosecution of the work," did not create or attempt to create any liability to abutting owners for change of grade other than that provided by law.

In 1883, when the grade of Rose street was established, the city of *La Crosse* was operating under a special charter (ch. 135, Laws 1876), which contained no provision for payment of damages to owners of abutting property on account of change of grade of streets, and there was no general statute at that time imposing such liability. So at the time the grade of Rose street was established in 1883 the city had the right to change or alter any prior established grade without compensation to abutting owners. *Harrison v. Milwaukee Co., supra; Colclough v. Milwaukee, supra.*

It is true that in 1901 the city of *La Crosse* adopted secs. 925—172 and 925—178, Stats., relating to establishing grades, but the evidence shows conclusively, and the court below found, that the new viaduct was built on the grade established by the ordinance of 1883, hence there was no change of grade after 1883.

Some argument is made that the so-called "paper grade" made by the ordinance of 1883 was not a "permanently established grade" within the meaning of sec. 925—172, therefore a permanently established grade, within the meaning of the statute, was not established until the new viaduct was built. This contention would lead to the conclusion that there was at no time a change of the established grade.

The so-called "paper grade" was definitely established by

ordinance of the common council, duly passed at the time the old viaduct was constructed, and established the grade upon Rose street from Gould street on the south to Hagar street on the north. But, as found by the court, Rose street at no time prior to the construction of the new viaduct in 1913 was graded to the established grade at all points. The ordinance passed at the time the new viaduct was built reaffirmed the grade as established by the ordinance passed when the old viaduct was built, and the new viaduct was built according to such grade.

It follows that upon no theory of the case was there a change of the established grade, hence no liability on the part of any of the defendants to abutting owners.

By the Court.—The judgment is affirmed.

A motion for a rehearing was denied, with $25 costs, on June 12, 1917.

GOUGH, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and others, Respondents.

April 7—June 12, 1917.

Workmen's compensation: Action to review award: Jurisdiction of circuit court: Strict compliance with statute: "Adverse party" to be made defendant.

1. Strict compliance with the requirements of sec. 2394—19, Stats., is necessary to give the circuit court jurisdiction of an action to review an award made by the industrial commission under the Workmen's Compensation Act.
2. Thus, unless the summons and complaint is served upon an adverse party within the twenty days limited by said section, the circuit court has no jurisdiction to proceed in any action which would necessarily affect the rights of such adverse party.
3. Where the industrial commission wholly disallowed the claim of the widow of an employee who was accidentally killed, and awarded compensation to his mother instead, the mother was an adverse party to the widow within the meaning of sec. 2394—19, Stats., their claims being conflicting.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from a judgment affirming an award of the *Industrial Commission* in favor of defendant *Mrs. Thomas Gough.*

One John Gough was accidentally killed while in the employ of the *Flanner-Steger Land & Lumber Company.* The plaintiff, widow of said John Gough, made application for compensation before the *Industrial Commission;* his mother, *Mrs. Thomas Gough,* also filed her claim. For the convenience of all the parties the two applications were heard at the same time and both claimants appeared and testified, and *Mrs. Thomas Gough* was cross-examined by the plaintiff's counsel.

The *Commission* made findings to the effect that deceased had contributed during the last years of his life to the support of his mother; that plaintiff and John Gough never lived together as husband and wife subsequent to the marriage, and the evidence discloses that he had deserted and expressed an intention to never live with her and had paid but $10 to her support and that of their child from the time of their marriage in December, 1912, to his death March 3, 1916; and an award was made disallowing the claim of the plaintiff entirely and awarding compensation to the mother, *Mrs. Thomas Gough.*

In June, 1916, and within the twenty days from the entry of the award, the plaintiff commenced an action in the circuit court for Dane county making the *Industrial Commission* and the *Flanner-Steger Land & Lumber Company,* the employer, parties. Subsequently demurrers were interposed by these defendants raising the question as to the omission to make *Mrs. Thomas Gough* a party. The demurrers being overruled, the then defendants and plaintiff stipulated that an amended summons and complaint making *Mrs. Thomas Gough* a party might be served, and the same was served upon

her on October 20, 1916. She appeared in said action and by answer raised the question of the jurisdiction of the court, on the ground that summons and complaint had not been served upon her as an adverse party within the twenty days after the entry of the award by the *Commission*. By amended answers the *Flanner-Steger Land & Lumber Company* and the *Commission* raised the same question as to jurisdiction. The circuit court overruled the objections as to the jurisdiction and confirmed the award of the *Commission*, and from the judgment entered in accordance therewith the plaintiff appeals.

L. M. Nelson of Marinette, attorney, and *M. J. Doyle* of Menominee, Michigan, of counsel, for the appellant.

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman*, assistant attorney general, and oral argument by *Mr. Gilman*.

The following opinion was filed April 24, 1917:

ESCHWEILER, J. If the objection interposed by the defendants to the jurisdiction of the circuit court on the ground that *Mrs. Thomas Gough*, as an adverse party, was not served with summons and complaint within the twenty days from the date of the award to her by the *Industrial Commission* is well taken, it disposes of this action, and the questions raised by the plaintiff as to whether or not she was so dependent upon the deceased as to entitle her to compensation need not be considered.

The material part of sec. 2394—19, Stats., is as follows:

"The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive; and the order or award, whether judgment has been entered thereon or not, shall be subject to review only in the manner and upon the grounds following: Within twenty days from the date of the order or award, any party aggrieved thereby may commence, in the circuit court for Dane county, an action against the commission for the review of such order or award,

in which action the adverse party shall also be made defendant."

Among the evident purposes of the Workmen's Compensation Act was to provide for a speedy disposition of the vast number of claims for injuries arising in the industrial world and to prevent, as far as possible, delays that might arise from protracted litigation. It is therefore provided by this statute that the period within which any party aggrieved by a decision of the *Industrial Commission* must exercise the right therein given of having a review of the same is limited to twenty days from the date of the order or award, and the *Industrial Commission* and the adverse party must be made defendants in such proceedings. From the evident purpose of the act and the stringent language used in this statute so hedging in the right to review, we hold that unless the person feeling aggrieved by the order or award of the *Commission* pursues its dictates closely, the circuit court obtains no jurisdiction to review such order or award.

The plaintiff by her original complaint herein recited the proceedings before the *Commission,* which show the appearance of *Mrs. Thomas Gough,* the fact that the award was made to her instead of to plaintiff, and then demanded that the award should be set aside and judgment be entered in favor of plaintiff, thus showing full knowledge on her part of the position that *Mrs. Thomas Gough* occupied. Now, therefore, if *Mrs. Thomas Gough,* to whom an award was made on account of the death of John Gough, was such an adverse party to the plaintiff as is described in this statute, then the failure within the twenty days to commence the action against her gave the circuit court no jurisdiction to proceed.

To now find in favor of plaintiff would necessarily require the setting aside of the award in favor of the mother, *Mrs. Thomas Gough.* It is evident that an award to the mother could not be permitted to stand if an award should properly have been made to the widow. The rights, if any, therefore,

of the widow would necessarily be adverse to those of the mother, if any. The mother, *Mrs. Thomas Gough,* must therefore be held to be an adverse party within the meaning of the statute as well as the defendant employer, and, there having been no service upon the mother of the summons and complaint within the time fixed by the statute, the circuit court had no jurisdiction to proceed in any action which would necessarily affect her rights. *Hammond-Chandler L. Co. v. Industrial Comm.* 163 Wis. 596, 158 N. W. 292. The objections interposed to the jurisdiction of the circuit court should therefore have been sustained and the action dismissed.

The result of this decision is in effect to affirm the judgment of the circuit court so far as it confirmed the award of the *Industrial Commission,* even though it is upon another ground than that taken by the circuit court in its decision, and even though the circuit court should have dismissed the proceedings for want of jurisdiction, inasmuch as that would have necessarily restored the award of the *Commission* to its full effect.

By the Court.—The judgment of the circuit court is affirmed, no costs to be taxed by any party.

A motion for a rehearing was denied, without costs, on June 12, 1917.

TREBOWOSKI, Respondent, vs. TOWN OF RINGLE and another, Appellants.

May 15—June 12, 1917.

Highways: Injury from defect where highway intersects town line: Joint and several liability.

Under sec. 1339, Stats.—giving a right of action for an injury to person or property caused by the insufficiency or want of repair of a highway "in any town,"—where an injury is caused by a defect at a point where a highway intersects the boundary line between two towns, such towns, being both in duty bound to keep the highway in a reasonably safe condition at that point, are jointly and severally liable for the injury and an action may be maintained against either or both.

APPEALS from an order of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

The appeals are from an order overruling demurrers to the complaint for insufficiency and misjoinder of defendants.

The allegations of the complaint were sufficient to constitute a cause of action against each and both of the defendants if there can be a joint statutory liability for a personal injury against two towns under the circumstances stated, which were to this effect: The towns of *Ringle* and *Pike Lake* adjoin, with a north and south highway crossing the boundary between the two. At a point on the ground in the town of *Ringle,* about five rods north of such boundary and one rod east of the center of the traveled way, a telephone wire was extended southwesterly to the top of a telephone pole located in the town of *Pike Lake* about four rods south of such boundary and one rod west of such center line so that, at the point where such way crossed such boundary, the wire was about seven feet from the ground. Plaintiff, while traveling with ordinary care south on such way, seated in a top wagon to which a team of horses was attached, and being driven with ordinary care, was severely injured by the top coming in con-

tact with the wire at such point, causing the horses to become frightened and the wagon to be upset. In due time notice of the injury and claim for damages was served on the proper officers of both towns. As to the place of injury, the complaint stated this:

"When said plaintiff reached the intersection point, where said highway intersects said town line, the said telephone wire extending across said highway caught the top of the wagon in which plaintiff was seated and thereby caused said horses to become frightened, upsetting said wagon, throwing said plaintiff from said wagon on to the ground and thereby seriously injuring and bruising said plaintiff's head, face and body, compelling her to be confined to her bed for some time."

The notice of injury, served as aforesaid, contained substantially a like statement.

The defendants separately demurred to the complaint upon the grounds before indicated and separately appealed from the decision in respect thereto.

For the appellants there was a brief by *Brown, Pradt & Genrich* of Wausau, attorneys for *Town of Pike Lake,* and *M. W. Sweet* of Wausau, attorney for *Town of Ringle,* and the cause was argued orally by *Mr. Sweet* and *Mr. L. A. Pradt.*

For the respondent the cause was submitted on the brief of *Regner & Ringle* of Wausau.

MARSHALL, J. True, as suggested by counsel for appellants, liability for injuries to persons or property caused by defective highways is wholly statutory. It rests in the duty, created by the written law, of every town, city, or village to keep its highways, including bridges, in a reasonably safe condition for public travel, and responsibility thus created for damages happening by reason of failure to perform such duty. Sec. 1339, Stats. Such failure is deemed to be negligence as a matter of law and hence a wrong of tortious character. *Jaquish v. Ithaca,* 36 Wis. 108; *Fehrman v. Pine*

River, 118 Wis. 150, 95 N. W. 105. True, also, the statute does not make any express provision respecting liability for damages where the defect causing the damage is at a point common to two towns, as in this case. The language of the statute is as follows: "If any damage shall happen to any person, his team, carriage or other property by reason of the insufficiency or want of repair of any bridge, sluiceway or road in any town, city or village, the person sustaining such damage shall have a right to sue for and recover the same against any such town," etc., subject to a requirement for giving notice within a specified time and in a specified way to the municipality "against which damages are claimed" and stating, among other things, where such damage occurred.

Is the language of the statute, "in any town," etc., as to the place of a defective highway causing injury to a person using the same, and the language as to service of notice on the municipality against which the damage is claimed stating "where such damage occurred" confined to events characterized by a defect at a point in a highway wholly within one municipality? Counsel for appellants contend for the affirmative. If that should prevail the result would be that the statute leaves a person remediless who suffers damage from a defective highway at a point which is common to two towns. That the legislature did not intend such an absurdity seems quite clear. By a familiar principle, if the language of the written law can reasonably be read so as to avoid such absurd result, it should be presumed that it was intended to be so read and effect be given thereto accordingly.

It is considered that a point which is common to two towns, as the boundary line between them, in a proper sense, may be said to be within either or both and so that the words of the statute "in any town" apply to such point as regards either municipality. It follows that a defective highway at such a point answers to the call of the statute for "any town" as applied to each or both of the municipalities and that both

are in duty bound to maintain the highway at such point in a reasonably safe condition for public travel. Failure to do so is a joint and several liability, in case of damage to any one in his person or property happening thereby.

Our attention is called to the fact that sec. 1339, Stats., in effect, provides that in case of damage to person or property happening from a defective bridge, erected and maintained at the joint expense of two towns, the sufferer may maintain an action against the two, it being immaterial on which side of the boundary between them the accident occurred. From that counsel draw the inference that the legislature deemed it necessary to specially provide for an action against two towns for damages caused by a defective highway in order for competency to maintain such an action to exist. It does not seem so. The statute deals with the subject of joint liability of two towns in the special circumstance of damage occurring from a defective highway at a point which may be wholly within one of them. Such special circumstance required something supplementary to the general language referring to damage happening from a defective highway in any town, or else a town jointly liable with an adjoining town for the maintenance of a bridge might be held solely responsible for damages happening on the bridge because of a defect on its side of the boundary. In case of a defect which is common to two towns, hence within one as much as the other, no special provision, as that in respect to joint liability in case of bridges jointly constructed and maintained, was required.

From the foregoing it would seem that both of the defendants are liable, if, as alleged, the injury to plaintiff was caused by a defect in the highway at a point which was common to both and, being so liable and the nature of the wrong being of a tortious character, it seems that the elementary principle applies that an action may be maintained against either or both, as the trial court held.

The foregoing is in harmony with *Clapp v. Ellington,* 87

Hun, 542, 34 N. Y. Supp. 283, affirmed in 154 N. Y. 781, 49 N. E. 1095, cited to our attention by counsel for respondent. It was there held that an action of this nature is for tort; that in case of a defect in a highway at a point where each of two towns is in duty bound to maintain the same in a reasonably safe condition for public use, such defect is in each of the towns and the principles as to remedies for damages for wrongs of a tortious character apply. The remark of BARNARD, J., in *Oakley v. Mamaroneck,* 39 Hun, 448, "When an accident results from joint negligence, all or either of the towns may be sued," "in harmony with the general rule in actions not on contract," was approved.

By the Court.—The order appealed from is affirmed, respondent to have costs against each appellant.

SOBUSH, Administrator, Respondent, vs. TOWN OF RINGLE and another, Appellants.

May 15—June 12, 1917.

Trebowoski v. Ringle, ante, p. 637, followed.

APPEALS from an order of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

The appeals are from an order overruling demurrers to the complaint for insufficiency and misjoinder of defendants.

For the appellants there was a brief by *Brown, Pradt & Genrich* of Wausau, attorneys for *Town of Pike Lake,* and *M. E. Sweet* of Wausau, attorney for *Town of Ringle,* and the cause was argued orally by *Mr. Sweet* and *Mr. L. A. Pradt.*

For the respondent the cause was submitted on the brief of *Regner & Ringle* of Wausau.

MARSHALL, J. The questions raised on the two appeals are the same as those decided in *Trebowoski v. Ringle, ante,* p. 637, 163 N. W. —, and are ruled in favor of respondent by the result in that case.

By the Court.—The order is affirmed, respondent in each appeal to recover for costs in this court, attorneys' fees and clerk's fees; but no costs for printing.

MALANCY, Appellant, vs. MALANCY, Respondent.

May 15—June 12, 1917.

Life insurance: Benefit societies: Change of beneficiary: By-laws and statute are part of certificate: Rights of beneficiary under a contract.

1. The beneficiary named in a certificate issued to a member of a fraternal benefit society does not acquire absolute and indefeasible rights until the death of the member.
2. A by-law of such a society, providing that any agreement entered into by a member not to change the beneficiary shall be null and void, and the statute (sub. 5, sec. 1957, Stats.) providing that he may change the beneficiary named without the consent of such beneficiary, become part of the terms and conditions of the certificate.
3. The fact that a change of the beneficiary in such a certificate was made by the member for a valuable consideration paid to him did not give the second beneficiary any legal or equitable right to the proceeds of the certificate as against the person in whose favor another change was afterwards made by the member in accordance with the by-laws of the society.

APPEAL from a judgment of the circuit court for Lincoln county: A. H. REID, Circuit Judge. *Affirmed.*

This is an action by *Louise Malancy* to recover a fund of $1,000 from the Modern Woodmen of America, a fraternal benefit society, which was originally a party to the suit, upon the membership of William Malancy, her husband, in the society. *Tressie Malancy,* mother of William Malancy, also makes claim to the fund. The Modern Woodmen of America paid the fund into the court to abide the result of this action. The action was dismissed as to the society and proceeded as to the other parties.

William Malancy became a member of the Modern Woodmen of America in July, 1906, and it issued to him a benefit certificate for $1,000, in which the defendant, *Tressie Malancy,* was made beneficiary.

Prior to February 9, 1911, William Malancy, ill with tu-

berculosis, contemplated entering the Modern Woodmen sanitarium in Colorado for treatment. His friends donated a fund to pay his expenses, but refused to deliver the fund until he made his benefit certificate payable to his wife. He made application for change of beneficiary and a certificate was issued in which his wife was named as sole beneficiary. The by-laws of the society provide that in order to change a beneficiary in a certificate the member shall deliver the certificate in writing to the camp clerk, and that in case the certificate cannot be returned then that the member execute a waiver of benefit in lieu of such surrender of the certificate. The by-laws also provide that any agreement entered into by a member not to change his beneficiary shall be null and void. In this case the original certificate was not surrendered to the camp clerk because the defendant, *Tressie Malancy,* refused to deliver it up. No waiver of benefit under the original certificate was made or filed with the society, but, without insisting upon this, the society issued a second certificate, in which the plaintiff was named as sole beneficiary.

In October, 1914, without the knowledge of the plaintiff, William Malancy made application to change the beneficiary, this time naming *Louise Malancy* as beneficiary of $500 and *Tressie Malancy* as beneficiary of $500. He filed a waiver of claims under the second certificate, and the society issued a third certificate in accordance with the application.

In May, 1915, William Malancy executed a surrender of the third certificate and made application for one payable solely to *Tressie Malancy* as beneficiary.

William Malancy died on August 30, 1915, due proof and notice of his death being given to the society by *Tressie Malancy.*

The court found that *Louise Malancy* had no cause of action, that *Tressie Malancy* should recover the fund of $1,000, but that she could not recover costs from either the Modern Woodmen of America or from the plaintiff.

The plaintiff claims the fund under the second certificate, upon the ground that William Malancy had agreed to make his wife the sole beneficiary of the fund in consideration of the expense fund advanced to him by his friends.

The plaintiff asks that the judgment of the circuit court be reversed and judgment ordered in favor of the plaintiff.

For the appellant there were briefs by *G. M. Sheldon,* attorney, and *R. T. Reinholdt,* of counsel, both of Tomahawk, and oral argument by *Mr. Reinholdt.*

For the respondent there was a brief by *P. T. Stone* of Wausau and *J. & M. Van Hecke* of Merrill, and oral argument by *John Van Hecke.*

SIEBECKER, J. There is no dispute concerning the issuing of the certificates upon the decedent's application to the society, that they became effective under its regulations, and that the proceeds thereof were properly paid into the court. The question presented is: Has the plaintiff any claim to the proceeds under the second certificate issued to the deceased in which she was named the sole beneficiary? It is contended that she acquired a special vested interest in this certificate for a valuable consideration and hence a right to the proceeds thereof, of which she cannot be deprived without her consent as against the defendant who is named the sole beneficiary in the certificate last issued to deceased. The friends of the plaintiff's husband who raised the fund to defray his expenses to send him to Colorado refused to give him the fund until he caused his wife to be made the sole beneficiary of this fraternal insurance. Sub. 5, sec. 1957, Stats., provides, "Any member" of a fraternal benefit society, order, or association "may change the beneficiary named in his certificate or policy without the consent of such beneficiary, by complying with the by-laws of the society, order or association." The by-laws of the society provide that any agreement entered into by a member not to change the beneficiary shall be

null and void. The provisions of such by-laws and the statutes become part of the terms and conditions of a benefit certificate of fraternal societies. *Ormond v. McKinley,* 163 Wis. 205, 157 N. W. 786; *Thomas v. Covert,* 126 Wis. 593, 105 N. W. 922.

It is well established that the beneficiary under such a certificate does not acquire absolute and indefeasible rights until the death of a member. *Rawson v. Milwaukee Mut. L. Ins. Co.* 115 Wis. 641, 92 N. W. 378; *Ormond v. McKinley, supra; Raschke v. Haderer,* 138 Wis. 129, 119 N. W. 812. We are cited to the case of *Faubel v. Eckhart,* 151 Wis. 155, 138 N. W. 615, as authority to the point that the decedent had power to contract for the disposition of the proceeds of the certificate, and that if he did so for a valuable consideration it became irrevocable as to any subsequent beneficiary who is a mere volunteer as against the one named in such contract. This contention is not sustained by the decision of this case. The court there explicitly held upon the authority of *Hutson v. Jenson,* 110 Wis. 26, 85 N. W. 689, "that the insured has no title, ownership, or property in the fund agreed to be paid to another after his death. He has a mere power of appointment of a beneficiary during his lifetime, and in that power the beneficiary has no vested interest." Under the statutes, sub. 5, sec. 1957, the by-laws of the association, and the adjudications of this court the deceased had the power to change the beneficiaries of his certificate as he did, and the plaintiff had no legal or equitable right to the proceeds of the certificate in question as against the defendant who was named by the insured as the sole beneficiary. The court properly held that the defendant is entitled to the fund paid into court.

By the Court.—The judgment is affirmed.

ALSHEIMER and another, Plaintiffs in error, vs. THE STATE, Defendant in error.

May 18—June 12, 1917.

Criminal law and practice: Prior convictions: Evidence: Pleading: Opening statement: Error affecting substantial rights.

1. **In a criminal prosecution evidence of prior convictions cannot be received unless they are alleged in the information.**
2. **Where prior convictions were not alleged in the information, it was error to permit the district attorney to state, in his opening remarks, that he would prove such convictions, and such error is *held* in this case to have "affected the substantial rights of" the defendants (sec. 3072*m*, Stats.), it appearing that the evidence upon which they were found guilty was far from conclusive and was such that different juries might very well arrive at different results, and that not until the close of the trial—no evidence of such convictions having been offered—did the trial court instruct the jury to disregard such statement. MARSHALL, J., WINSLOW, C. J., and VINJE, J., dissent.**

ERROR to review a judgment of the municipal court of Dane county: AUGUST C. HOPPMANN, Judge. *Reversed.*

Assault with intent to rob. The plaintiffs in error, *Alsheimer* and *Kronenberg,* hereinafter designated defendants, on the 29th day of March, 1917, were convicted of the crime of committing an assault with intent to rob, being unarmed. The information is as follows:

"I, Harry Sauthoff, district attorney for said Dane county, hereby inform said court that *Joseph Alsheimer* and *Herman Kronenberg,* on the 25th day of February, 1917, at the city of Madison, in said Dane county, did unlawfully and feloniously assault one Albert Wendt, with force and violence and with intent then and there to rob, not being armed with a dangerous weapon, against the peace and dignity of the state of Wisconsin."

In his opening statement to the jury the district attorney stated (1) that he would show by the clerk of the court that the defendant *Alsheimer* in December, 1914, had been convicted of the crime of burglary and sentenced to two years in

the state prison; (2) that the defendant *Kronenberg* had been convicted of the crime of burglary in December, 1908; (3) that *Kronenberg* had been convicted of the crime of burglary on June 4, 1912; and (4) that he would show that defendant *Kronenberg* had been convicted of the crime of burglary in February, 1904. To each of these statements as made counsel for defendants objected on the ground that the statements were prejudicial, and requested the court to admonish the district attorney and to instruct the jury that they should disregard the statements made by him. The court overruled the objection and the trial proceeded. In his instruction given at the close of the trial the court said:

"Gentlemen of the jury, in the opening statement made by the district attorney yesterday he referred to certain records of the defendants in this case, which he said he would introduce in evidence. I want to instruct you, now, as you know that no such evidence has been introduced, no records have been introduced with reference to any offense or offenses of any kind heretofore committed by the defendants, and the court instructs you that all the statements made by the district attorney, so far as they refer to those records of these defendants and those offenses or any records of the defendants in the past, you must entirely disregard. They are not evidence in the case at all, and the court now withdraws these statements from you, gentlemen of the jury."

The jury found both defendants guilty and they were sentenced to the state prison at Waupun for a period of two years, and this writ is prosecuted to review the judgment.

For the plaintiffs in error there was a brief by *Elmore T. Elver* and *Henry H. Morgan* of Madison, and oral argument by *Mr. Elver.*

For the defendant in error there was a brief by the *Attorney General* and *Harry Sauthoff,* district attorney, and oral argument by *Mr. Sauthoff.*

ROSENBERRY, J. That evidence of such prior convictions could not be received unless such prior convictions were al-

leged in the information has been repeatedly determined by this court. *Paetz v. State,* 129 Wis. 174, 107 N. W. 1090; *Howard v. State,* 139 Wis. 529, 121 N. W. 133; *Dahlgren v. State,* 163 Wis. 141, 157 N. W. 531. That it was error for the district attorney, such facts not being set forth in the information, to make the statements which he did to the jury, is likewise well established. *Buel v. State,* 104 Wis. 132, 80 N. W. 78; *Baker v. State,* 120 Wis. 135, 97 N. W. 566; *Paulson v. State,* 118 Wis. 89, 94 N. W. 771. No attempt was made to amend the information and no effort was made to introduce evidence in support of the statements made by the district attorney.

"Section 3072*m*. No judgment shall be reversed or set aside or new trial granted in any action or proceeding, civil or criminal, on the ground of misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure the new trial."

Does it appear that the substantial rights of the defendants are affected by the error complained of? The evidence upon which the defendants were found guilty was far from conclusive, and different juries might very well arrive at different results. As was said by this court in *Paulson v. State,* 118 Wis. 89, 99, 94 N. W. 771:

"In a doubtful case even the trained judicial mind can hardly exclude the fact of previous bad character or criminal tendency, and prevent its having effect to swerve such mind toward accepting conclusion of guilt. Much less can it be expected that jurors can escape such effect."

Had the district attorney made any one of the statements complained of, objection thereto been promptly sustained,

and the jury then and there instructed to disregard such statement, it might be said that the substantial rights of the defendants were not affected. In this case, however, objection to the improper remarks was made promptly, and repeated as each statement was made, and the objection overruled by the court. The impression gained by the jury was permitted to remain with them for more than a day, and then the jury were instructed that the statements of the district attorney so far as they related to the defendants' records should be disregarded. Upon this record we are of opinion that the substantial rights of the defendants were affected by the error complained of.

It does not appear from the record whether the facts stated by the district attorney were or were not susceptible of proof, and it may well be that the jury thought the evidence was excluded for some technical reason, and their deliberations must have been affected to some substantial extent by the improper statements. While the administration of our criminal law should not be embarrassed by a strict adherence to merely technical rules, yet each citizen is entitled to a fair trial. If the men were not ex-convicts as stated by the district attorney, there was no justification for the statements; if the statements were true, the procedure was clearly and plainly marked out. The facts must be alleged in the information, and if not so alleged when it is filed it may be amended on leave of court. When the facts are set out in the information and admitted by the defendant, it is prejudicial to allow proof of them and comment thereon by the district attorney. *Howard v. State,* 139 Wis. 529, 121 N. W. 133.

Other errors complained of are not likely to be repeated upon a second trial, and we shall not further notice them here.

By the Court.—Judgment reversed, and cause remanded for a new trial. The warden of the state prison will deliver

the plaintiffs in error into the custody of the sheriff of Dane county, who will hold them in custody to await the further order of the court.

MARSHALL, J. (*dissenting*). Did the improper conduct of the trial really prejudice defendants? That is the question upon which the case turned and in respect to which the court is divided.

There are many authorities found in other jurisdictions and some prior to our late statute, in respect to disregarding harmless errors, which are in harmony with the conclusion reached. Many are cited and quoted from in the brief of counsel for plaintiffs in error; but they do not apply to our system.

Formerly the rule was that prejudice is to be presumed from the happening of error; but that has been radically changed by the written law and this court's administration of it. It would be a most regrettable backward step to not give, significantly, full effect to the reformed system, which it seems the result in this case will be regarded as failing to do, though it is not likely that such is intended.

Who here would consciously return to the system so out of harmony with our beneficent Code, which once rendered judgments so unstable as to be open to attack for inconsequential errors not affecting substantial rights, to the great prejudice of the public welfare? No one, I venture to assert.

This court may well be said to be in the front rank in rescuing judicial administration from a condition which was very unsatisfactory to the public because of the instability of judgments from the fatality of errors which, from a common-sense standpoint, did not affect them. I write this dissent for the purpose of giving as much significance to that as I reasonably can.

The people, designing to remedy the infirmity of the old system to which I have referred, early commanded that,

"The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of any such error or defect." Sec. 2829, Stats.

That applies to criminal as well as civil actions. *Oborn v. State,* 143 Wis. 249, 126 N. W. 737. For a time it was so overlooked as to not have the intended efficiency. After the court had substantially returned to the system of the written law, though leaving some uncertainty in respect thereto by reason of conflicting judicial expressions, evincing some want of harmony as to the scope of the written law, the legislature more emphatically and comprehensively restated its command, thus:

"No judgment shall be reversed or set aside or new trial granted in any action, civil or criminal, on the ground of misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure the new trial." Sec. 3072*m*, Stats.

The last expression of the people's will left no room for fair doubt as to its scope and the court has endeavored to effectuate it, as indicated in *Oborn v. State, supra; Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 139 N. W. 179; *Adams v. Bucyrus Co.* 155 Wis. 70, 75, 143 N. W. 1027; *Becker v. Beaver Mfg. Co.* 158 Wis. 471, 149 N. W. 209.

It has been considered, as an examination of the cases cited will clearly show, that, now, instead of prejudice being presumed from the happening of error and such presumption being efficient unless affirmatively overcome by an examination of the whole record, the presumption is not only against error but, in case of its occurring, against its being prejudi-

cial as to affecting any substantial right of the party complaining, such presumption to prevail unless affirmatively,—that is evidentiarily,—overcome by a reasonably clear appearance from the record that it was so harmful that, had it not occurred, the result might probably have been more favorable to the party complaining, such appearance to be convincingly apparent in the opinion of the court called upon to consider the matter from all the circumstances disclosed by such record.

Now, does the record before us satisfy the test of the written law for harmful error? To me it seems not. In answering that question I must consider that the trial court, who saw the defendants and the jury and, probably, knew some or most of the latter, in absence of a clear appearance to the contrary, must be presumed to have rightfully held that the improper remarks of the prosecuting attorney, in view of the court's instructions, did not efficiently influence the result. I must also assume that the jury was made up of intelligent, considerate men who understood and gave heed to the court's instructions, since there was ample testimony, direct and circumstantial, from which they might reasonably have reached the conclusion which they did.

True, the instructions to disregard the objectionable remarks of the prosecuting attorney in opening the case came a little late; but they were as plain and unmistakable as language could well be. With the jury before him, the judge could form an opinion, as correctly as practicable, whether he could efficiently withdraw such remarks from the attention of the jury. What is a trial court to do under such circumstances? The judge cannot anticipate and prevent such occurrences as those in question. Must he stop the trial and impanel a new jury in such a situation, which might happen in the closing hour of a long and expensive contest? May it not be left to him, viewing the entire situation, taking into consideration the character of the jury, that of the defendants

as they appear before him, and all the circumstances of the case, to deal with the matter efficiently, where, as here, there is ample evidence, circumstantial and direct, to take the case to the jury? I think so, and that such is the clear spirit of the Code. It was, in part, to vest just such power in a trial judge, the exercise of it not to be rendered ineffectual except by an affirmative showing, in view of all the circumstances shown by the record, that the improprieties involved may probably have led to the result complained of, that the written law was enacted, looking to a more common-sense, economical, from a private and public viewpoint as well, and more certain attainment of justice.

In conclusion I will say that I cannot discover any satisfactory affirmative rebuttal of the statutory presumption against prejudice from the circumstances relied upon by the majority for a reversal of the judgment. I have not deemed it best to refer to precedents where the efforts of trial judges to withdraw objectionable matters from a jury have been held efficient. There are many on the subject, each turning on the facts of the particular case. In view of the system based on our Code, I do not deem such decisions as particularly helpful.

I have written somewhat at length, deeming it of great importance that the court should firmly and fully vindicate the purpose of the written law, as it has been administered in recent years. I fear the decision here will be considered as out of harmony therewith.

I am permitted to say that the Chief Justice and Justice VINJE concur in my opinion that the record does not satisfy the required test for harmful error.

KINNICUTT and others, Respondents, vs. JOINT SCHOOL DISTRICT No. 1 OF THE CITY OF LADYSMITH AND TOWN OF FLAMBEAU, Appellant.

May 16—June 12, 1917.

Contracts: Fraud: Evidence: Attorneys at law: Opinion as to validity of bonds.

1. In an action to recover a deposit which had been made by plaintiffs to apply on the purchase price of bonds to be issued by the defendant, but which was to be returned if the legality of the bonds was not approved by plaintiffs' attorneys, a verdict finding that an adverse opinion of the attorneys was given "in bad faith and for the fraudulent purpose of giving the plaintiffs an excuse for refusing to accept the bonds," is *held* to be without support in the evidence.
2. Fraud must be shown by clear and satisfactory evidence.

APPEAL from a judgment of the circuit court for Rusk county: JAMES WICKHAM, Circuit Judge. *Affirmed.*

Action for money had and received. The essential facts are these: The defendant, a joint school district maintaining a high school, voted July 7, 1914, to issue five per cent. bonds for $60,000 to build a new schoolhouse and furnish the same. July 16, 1914, the plaintiffs, who are dealers in bonds with an office in Chicago, made a bid of $62,400 for the whole issue, subject to approval by their attorneys of the legality of the bond issue. This bid was accepted by letter dated July 20th. On July 21st plaintiffs sent to the district officers a certified check for $1,000 as a deposit to be applied on the purchase price of the bonds, but to be returned in case the legality of the bonds was not approved by respondents' attorneys. On July 24th the school district sent to the plaintiffs at Chicago a transcript of the proceedings authorizing the bond issue, which the plaintiffs forwarded to their attorneys, Messrs. Caldwell, Masslich & Reed, at New York, requesting examination of the legality of the proposed bonds. Correspondence was had thereafter between the attorneys and the

school district officers and their attorney, and on September 10th the attorneys sent a letter to the plaintiffs stating what seemed to them to be doubtful questions as to the validity of the organization of the joint school district, and declining to approve the validity of the bonds. In this letter the attorneys do not definitely pronounce the bonds invalid, but say that their doubts are so substantial and serious that they can only advise that they do not consider the investment safe. Thereupon the plaintiffs declined to take the bonds and demanded the return of their deposit. The school district sold the bonds to other parties at par, thus realizing $2,400 less than the amount of plaintiffs' bid, and refused to return the deposit, claiming to apply the same as a payment upon the $2,400 loss. This action is to recover the deposit, and the appellant defends on the ground that the action of the plaintiffs and their attorneys in declining to approve the validity of the bonds was taken dishonestly and in bad faith in order to avoid carrying out their bid, and not because of any defect in the bonds. A special verdict of one question was submitted to the jury, asking whether the refusal of the attorneys to approve the bonds was "in bad faith and for the fraudulent purpose of giving the plaintiffs an excuse for refusing to accept the bonds," and the jury answered the question in the affirmative. On motion of the plaintiffs the court held that the evidence was insufficient to sustain the verdict and directed judgment in plaintiffs' favor for the sum deposited, with interest, from which judgment the defendant appeals.

Charles Kirwan of Ladysmith, for the appellant.

T. M. Thomas of Ladysmith, for the respondents.

WINSLOW, C. J. The only question in the case is whether there was any evidence in the case sufficient to justify the verdict of the jury to the effect that the adverse opinion of the attorneys was rendered in bad faith.

The attorneys in question are a highly reputable firm, and

a verdict which brands them as unfit to practice law should not be based on conjecture or suspicion, but, like verdicts in all other cases of alleged fraud, upon clear and satisfactory evidence. Careful examination of the record convinces us that there is no evidence in the case which warranted the jury in coming to that conclusion. There is absolutely nothing to show collusion and no direct evidence of bad faith. The defendant relies entirely upon certain circumstances, among which are (1) the fact that the bond market became demoralized by the declaration of war in Europe just after the bid was made and hence that the plaintiffs were liable to lose on the transaction if the bid was carried out; (2) the fact that the attorneys took six weeks to examine into the question before rendering their opinion; (3) the fact that the attorneys assigned untenable grounds for their doubts; (4) the fact that the trial court in the present case determined that the bonds were valid and so instructed the jury; and (5) the fact that the plaintiffs refused to reopen the question and take the opinion of a Chicago attorney after they had received the opinion of the New York attorneys.

We have examined the testimony bearing on these contentions and do not find anything which rises to the dignity of proof of fraud or bad faith.

The transaction was an important one. Care was a prime requisite. Far better an excess of caution than a hasty or improvident decision. The interests of future investors, possibly of people whose limited means might all be invested in these bonds, were potentially depending on the decision. Under such circumstances the attorneys had a right to be cautious, nay it was their duty to be so; and if they had doubts, honesty compelled them to say so.

It would serve no good purpose to state the evidence even in an abridged form. It must be sufficient to say that in our judgment it entirely fails to show fraud or bad faith.

By the Court.—Judgment affirmed.

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1. The general rule that questions not raised in the trial court will not be reviewed in the supreme court on appeal is subject to many exceptions. This court undoubtedly has the power to

review such a question, but whether it should do so or not depends upon the facts and circumstances of the particular case. *Cappon v. O'Day,* 486

2. Under sec. 2405*m*, Stats., the supreme court may grant relief to an appellant if it appears that the real controversy has not been fully tried or if it seems probable that justice has miscarried, though the issue raised in that court was not raised by the pleadings or otherwise in the court below and there was no ruling or exception which brings the question before the supreme court. *Dupont v. Jonet,* 554

Same: Exceptions to findings: Bill of exceptions.

3. Exceptions to the trial court's findings were not filed until after the time limited by sec. 2870, Stats.; but a copy thereof marked "duplicate" is in the bill of exceptions and the trial court certified that the bill contained "the exceptions filed to the findings." *Held,* that such exceptions must be deemed to have been filed by leave under sec. 2831, Stats., and that they are sufficiently incorporated in the bill of exceptions. *Heins v. Thompson & Flieth L. Co.* 563

Same: Motions for new trial and to vacate judgment.

4. It appearing in this case that a motion for a new trial, made on the day after judgment had been entered without notice, was treated by the trial court as in effect a motion to vacate the judgment, it is *held* that, under all the circumstances, it should have that effect, so that on the appeal from the judgment the questions raised are properly before the court. *Galst v. American Ladder Co.* 307

Undertaking on appeal: Duty of attorneys, when party cannot furnish.

5. Although a tort action is being prosecuted by plaintiff's attorneys under a contract, made pursuant to secs. 2591*a*, 2591*m*, and 2591*n*, Stats., that their fees shall be contingent on the result and that they shall have a lien on the cause of action and on the damages recovered, and although said attorneys are able to furnish the undertaking required by sec. 3052 on appeal, they are not to be considered as in effect parties to the action, and so liable for costs or bound to furnish such undertaking, especially in view of sec. 2590, which prohibits attorneys from becoming sureties for their clients; and if the plaintiff is unable to furnish the undertaking, he is entitled to a certificate of that fact as provided in sec. 3052*m*, and the undertaking need not be given. *State ex rel. Malouf v. Merrill,* 138

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6. The lack of a specific finding by the trial court of a fact shown by uncontradicted evidence to exist will, when necessary, be supplied by the supreme court on appeal. *Laughnan v. Estate of Laughnan,* 348

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7. The decision of the circuit court that the evidence in a case does not present a jury question must, on appeal, be regarded as right unless the contrary clearly appears. *Kuchler v. Milwaukee,* 320

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8. An erroneous judgment will not be reversed when recovery is for no more than a nominal amount. *Barnard v. Cohen,* 417

9. The erroneous admission of immaterial evidence will not work a reversal of a judgment based on the verdict of a jury, where that verdict would have been the same if such evidence had been excluded. *Russell T. Co. v. Kenfield-Lamoreaux Co.* 136

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10. Upon an appeal from the Milwaukee civil court the circuit court should order a new trial only in case substantial justice cannot otherwise be done. Thus, where plaintiff was entitled, upon the evidence in the civil court, to recover $65 and no more, but had a verdict and judgment in that court for a larger sum, the circuit court should merely have reduced the recovery to $65, and should not have ordered a new trial. *Donovan v. Northwestern School for Stammerers,* 331

Appeal from county board. See COSTS, 2.

APPEARANCE.

1. Whether the appearance of a party for the purpose of making a motion in an action is a general or a special appearance does not necessarily depend upon the designation given it, but is to be determined, in case of doubt or dispute, from the nature and object of the appearance and the issues necessarily raised and litigated thereby. *Driscoll v. Tillman,* 245

2. If an appearance is for the sole purpose of moving to vacate an order or judgment for lack of jurisdiction because of no service of process on the appearing party, the appearance is special, whether so designated or not; but if he asks for relief which can be granted only by a court having jurisdiction of his person, the appearance will be held to be general though denominated as special. *Ibid.*

3. Where a party appeared for the sole purpose of having a judgment vacated so far as it affected his property on the ground that he was not served in the action, immaterial allegations in his petition showing how he was damaged thereby should not be held to make his appearance a general one, especially where the issue claimed to be raised by such immaterial allegations was not litigated and did not enter into the court's disposition of the case. *Ibid.*

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ASSAULT.

1. The use of firearms against members of a charivari party cannot be justified except where personal violence is threatened and it seems to be necessary for self-defense. *Bruno v. State,* 377

2. Upon a trial for assault with intent to do great bodily harm, a statement of the trial judge in his instructions to the jury as to the testimony of a witness who identified the defendant by his voice, is *held* to have been entirely correct. *Ibid.*

3. Although in such case the defendant denied the act charged, *i. e.* the firing of a shotgun into a charivari party, it being possible under the evidence that the jury might disbelieve his story and find that he fired in lawful self-defense, the error, if any, in submitting to the jury the question of self-defense was one favorable to defendant. *Ibid.*

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Agreement between attorneys: Public policy: Assignment of claims.

1. An agreement between a firm of lawyers and another lawyer, pursuant to which the latter went around among the sufferers from a flood and persuaded them to employ the firm to prosecute their damage claims and to assign their claims to one person for the purpose of facilitating the litigation, was against public policy, and the courts will not assist said lawyer to recover anything from the firm for his services in carrying out that agreement, whether such services were rendered before or after the procuring of the assignments. *Ellis v. Frawley,* 381

2. A judgment against the firm for the value of such services must be reversed on appeal even though the objection that the agreement was against public policy was first raised in the appellate court. *Ibid.*

Action for services: Counterclaim for fund received by attorney in trust.

3. In an action by an attorney at law against a bonding company to recover for services and disbursements, it is *held* that the undisputed evidence shows that plaintiff was retained by defendant in the matters concerning its liability on a fidelity bond, and that the jury's finding as to the amount which plaintiff was entitled to recover is sustained by the evidence. *Wheelan v. United States F. & G. Co.* 394

4. A claim having been made against defendant upon a fidelity bond by which it had insured a city to the amount of $2,500 against loss through larceny or embezzlement by one C., a city employee, defendant retained plaintiff, an attorney, in the matter, but afterwards, against his advice, paid $2,500 to the city on account of said claim. Thereafter, in a criminal action for larceny and embezzlement, C., who was defended by plaintiff, was acquitted. In this action to recover for services rendered by plaintiff to defendant the latter counterclaimed for $2,500

on the ground that money to that amount had been sent by relatives of C. to his wife and had been turned over to plaintiff subject to a trust for the benefit of defendant, and that it was to be used to pay any shortage in C.'s accounts with the city and to discharge the liability of C. to defendant and the liability of C.'s father upon an indemnity bond which he had given to defendant. The jury found that the fund so received by plaintiff was not sent to C.'s wife to be used solely for the purposes thus alleged. *Held*, upon the evidence, that such finding is not clearly wrong, and hence it must stand. *Ibid.*

5. Although a certificate of deposit of the money so received by C.'s wife was indorsed by her to plaintiff, and he deposited the same, as attorney for the defendant, it appears that this was done for the sole purpose of preventing garnishment of the fund by C.'s creditors; and the undisputed evidence shows that plaintiff did not receive it to hold as the attorney or agent of the defendant, but was to use it for the benefit of C. in defending the criminal action, to protect C.'s father against liability on his indemnity bond, and, so far as possible, to discharge the liability of C. to the city if he should be found guilty of larceny or embezzlement. *Ibid.*

6. It having been established that plaintiff does not hold said $2,500 fund for the purpose of discharging any liability of C. to the defendant, and C. not being a party to this action, the question whether C. had been guilty of larceny or embezzlement of the city's funds so as to become liable to defendant is not a proper issue to be determined on defendant's counterclaim; and until such a liability has been legally established defendant cannot assert a liability of C.'s father on the indemnity bond. Evidence offered by defendant to show that C. was guilty of larceny or embezzlement was, therefore, properly excluded in this action. *Ibid.*

AUTHENTICATION of foreign judgment. See JUDGMENT, 11.

AUTOMOBILES.

Negligence: Injury to street-car passenger: Violation of ordinance and statute.

1. A person crossing from the curb to enter the rear door of a street car, which was open for the reception or discharge of passengers, had assumed the position of a passenger within the meaning of a city ordinance and sec. 1636—49, Stats., requiring the driver of an automobile to stop when a street car is taking on or discharging passengers. *Zimmermann v. Mednikoff*, 333

2. The fact that the driver of an automobile violated the duty to stop imposed upon him by ordinance and statute did not absolve such passenger from his duty to exercise ordinary care for his own safety. *Ibid.*

3. A person who was struck by an automobile while crossing from the curb and about to enter the rear door of a street car, which was open to receive him as a passenger, had the right to presume that the driver of such automobile would comply with said statute and ordinance, and hence was not guilty of contributory negligence as a matter of law in attempting to enter the car as he did, even though he had not looked in the direction from which the automobile came. *Ibid.*

4. It being undisputed that while the street car was at a full stop, with its rear door open as an invitation to passengers, and while plaintiff was in the act of approaching to enter, an automobile, owned by one defendant and driven by the other as agent of the owner, started from a point of rest and attempted, in violation of the statute and ordinance, to pass the car, and in so doing struck the plaintiff, the trial court properly found that plaintiff's injury was caused by defendants' negligence. *Ibid.*

Same: Collision with vehicle.

5. In an action for injuries alleged to have been caused by defendant's negligence in running his automobile into plaintiff's buggy, a finding by the jury that plaintiff's buggy was moving away from the traveled track, to the right, when struck by defendant's automobile approaching from the rear is *held* to be sustained by the evidence. *Hoppe v. Petersen,* . 200

BANKS AND BANKING.

See BILLS AND NOTES, 4. INDEMNITY.

1. The words "Correct, Attest" followed by the signatures of bank directors, appended to a report transmitted to the commissioner of banking as showing the condition of the bank, mean not only that such directors bear witness but that they affirm the report to be true. *Eland State Bank v. Massachusetts B. & I. Co.* 493
2. Public policy as well as private rights require that officers of banks should be held to strict accountability in the discharge of their official duties. *Ibid.*

BENEFIT ASSOCIATIONS: Rights of beneficiaries: Change. See INSURANCE, 8–13.

BILL OF EXCEPTIONS. See APPEAL, 3.

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BILLS AND NOTES.

Validity. See HUSBAND AND WIFE, 1. SUNDAY.

Same: Delivery: Conditional or absolute: Gifts.

1. A judgment holding valid a note given by a son to his father, since deceased, is *held* to have been proper, notwithstanding the verdict of a jury to the effect that at the time the note was given the father made a gift to the son of the amount for which it was given—the evidence, so far as it tends to show a gift, being in direct contradiction of the plain terms of the note itself, and the undisputed testimony showing that the delivery of the note was not conditional, but absolute. *Estate of Winzenried,* 63
2. There having been no attempt by the father to transfer the title to the note, such as by indorsement and conditional delivery, evidence of oral statements by the father subsequent to the making of the note was not competent to contradict its terms. *Ibid.*

Same: Consideration.

3. Where the payee in a note made by father and son accepted therefor, after the father's death, a note of the widow (to whom the estate of her husband had come), and thereby waived a claim against said estate and also discharged the indebtedness of the

son, either the waiver or the discharge was a sufficient consideration for the widow's note. *Becker v. Noegel,* 73

Ownership: Gifts. See BILLS AND NOTES, 1, 2. HUSBAND AND WIFE, 2, 3.

Same: Transfer for value.

4. A finding by the trial court to the effect that a certificate of deposit had been indorsed by the depositor (since deceased) and turned over to plaintiff as compensation for her services, is *held* not to be contrary to a clear preponderance of the evidence. *Krause v. Arnold,* 158

Rights of guarantor. See GUARANTY, 4, 5.

BONA FIDE PURCHASER. See CANCELLATION OF INSTRUMENTS, 3, 4.

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BOUNDARIES. See NAVIGABLE WATERS.

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On boundary between counties: Repair. See COURTS, 3.

Boundaries of public easement. See NAVIGABLE WATERS, 2.

No right acquired by prescriptive use exceeds the extent of the use. Hence a prescriptive right acquired by a city, by the maintenance of a swing bridge over a river, to use certain space above the water for the swing of the bridge, carried no right to build a permanent structure on that part of a riparian owner's submerged land which is under the arc of the swing. *Metropolitan Inv. Co. v. Milwaukee,* 216

BROKERS.

1. An agency contract whereby plaintiff undertook to sell defendant's farm "at and for the price and sum of $3,000, to be paid . . . one half cash, balance on time at six per cent.," and "upon payment of said sum as above provided" defendant agreed to convey title "clear of all incumbrances, except a mortgage of $700 now on said land," was an entire contract for the sale of the whole farm and meant that the sum of $3,000 was to be paid defendant over and above the existing mortgage of $700. *Kolsbun v. Ausen,* 54

2. Where a contract for an exchange of lands provided that each party thereto was to pay as a brokerage fee to certain brokers a specified sum "at the time of the closing of the said exchange," and that all deeds were "to be passed and this negotiation to be closed within fifteen days from the date of this agreement," the parties to such contract could not by rescinding it or refusing to carry it out affect the right of the brokers to receive such fees at the expiration of the fifteen days mentioned. *Micek v. Wamka,* 97

BUILDING CONTRACTS. See CONTRACTS, 5, 6. SCHOOLS AND SCHOOL DISTRICTS.

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BY-LAWS. See INSURANCE, 9, 12, 13.

CANCELLATION OF INSTRUMENTS.

See DEEDS, 3–5.

1. In an action by a railway company to set aside on the ground of mistake a quitclaim deed of certain lands over which its railroad ran, it is *held*, upon the evidence, that the officers of the company were not inexcusably negligent in giving the quitclaim deed, and that because of their mistake such deed is void as against the grantee therein. *Chicago, St. P., M. & O. R. Co. v. Bystrom*, 125
2. Equity will grant relief by way of rescission in a proper case for the mistake of one party as readily as for a mutual mistake, where it would be contrary to equity and against conscience to allow the enforcement of the contract. *Ibid.*
3. One who purchased a part of the lands in suit from the grantee in the quitclaim deed above mentioned while the record title was in such grantee, and who, before purchasing, had examined such title and had also made inquiry of the railway company's land commissioner as to what that company's rights were and had been informed that it did not own the land, was properly held an innocent purchaser and his title confirmed. *Ibid.*
4. The railroad right of way over the lands in suit did not pass to the grantee in the quitclaim deed or to the purchaser from such grantee. *Ibid.*

CARRIERS.

Carriage of goods: Owner's risk: Freezing of apples.

1. By accepting a bill of lading including the words "owner's risk," or letters understood by the parties to be their equivalent, a shipper relieves the carrier from its responsibility as an insurer and limits the same to responsibility for negligence. *McGovern v. Ann Arbor R. Co.* 525
2. A carload of apples was shipped from Michigan across Lake Michigan to Wisconsin late in December. By its published tariff (which was part of the contract) the carrier offered the shipper the opportunity of putting a stove in the car with a man in charge of it, but did not offer to warm or house the car itself. The shipper did not accept such offer, but, by accepting the bill of lading with the letters O. R. (owner's risk), chose to assume the risks incident to an ordinary and expeditious transit of the car. The car went through on schedule time, but on its arrival in Wisconsin the apples were found to be frozen. There was no evidence of a custom on the part of railroad companies to "round-house" such shipments *en route*. *Held*, that no negligence of the carrier was shown. *Ibid.*

Carriage of passengers: Injury in alighting. See LIMITATION OF ACTIONS, 4.

3. In an action for injuries sustained while alighting from an interurban electric car, a finding by the jury that plaintiff was injured by striking his back against a post on alighting from the car is *held* not contrary to all reasonable probabilities, in view of the evidence and the fact that two juries have so found and two trial judges approved such finding. *Glasheen v. Wisconsin T., L., H. & P. Co.* 24

CAUSE OF ACTION: When arises or accrues. See VENUE, 2–5.

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CHATTEL MORTGAGES.

See GUARANTY, 4, 5.

1. In an action by the assignee of a chattel mortgage to recover, from one who purchased from the mortgagors, property covered by such mortgage, the question whether there had been such a filing of the mortgage as to make it valid against third persons is determined on appeal though not raised in the trial court—the facts being fully shown by the record and the question having been fully argued. *Cappon v. O'Day*, 486
2. Under secs. 2313, 2314, Stats., a chattel mortgage, to be valid as against third persons, must be filed in the office of the clerk of the town, city, or village in which each of the mortgagors resided at the time of its execution. *Ibid.*
3. A chattel mortgage filed in a town to which one of the mortgagors subsequently removes is not properly filed; nor does the removal of the mortgagors to the town in which the mortgage is in fact filed, but improperly so, make the mortgage valid as to third persons. *Ibid.*

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COMMERCE.

Interstate commerce. See MASTER AND SERVANT, 5–12. WORKMEN'S COMPENSATION, 13, 14.

1. A purchase of goods in this state for shipment to and sale in other states constitutes interstate commerce; and the fact that the title to the goods passes to the purchaser in this state is immaterial. *Jerome P. Parker-Harris Co. v. Kissel M. C. Co.* 518
2. The fact that the purchaser in such a case, a foreign corporation, has not complied with sec. 1770*b*, Stats., does not render the contract void on its behalf. *Ibid.*

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In an action by a stockholder and creditor of a gas company in behalf of the company to recover damages on the ground that certain named defendants, as officers of the company, having fraudulently conspired to wreck the company, so mismanaged it that it went into the hands of a receiver and was sold to said defendants at foreclosure sale at much less than its real value, findings of the trial court to the effect that there was no conspiracy and no mismanagement and that the property was sold at its fair value at the foreclosure sale, are *held* to have sufficient support in the evidence. *Neff v. Barber*, 503

CONSTITUTIONAL LAW.

Legislative power: Extent. See COUNTIES, 1–6. TAXATION, 8. TELEGRAPHS.

The state constitution not being so much a grant as a limitation of power, the legislature has authority to exercise any and all legislative powers not delegated to the federal government nor expressly or by necessary implication prohibited by the national or state constitution. *Outagamie County v. Zuehlke*, 32

County government: Uniformity. See COUNTIES, 2.

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1. An oral promise by a father to devise a part of his farm to his son or to die intestate if the son, after becoming of age, would continue to work for him on the farm, was void under the statute of frauds (sec. 2304, Stats.); but proof of such promise rebuts the presumption that the services performed by the son were gratuitous, and the promise is a sufficient basis for the recovery of their reasonable value. *Laughnan v. Estate of Laughnan,* 348

Same: Ratification: Injunction against breach.

2. Even if the advertising manager of the defendant newspaper publishing company had no authority to contract with plaintiff for the publishing of a stated quantity of advertising for a period of three years at a fixed rate, with an option for a two-years renewal, yet, where such contract came to the notice of defendant's business manager within the three years and he, having full authority, failed to disavow it and the defendant continued to receive and publish plaintiff's advertising in accordance with its terms, the contract became binding in its entirety. *Ed. Schuster & Co. v. Kuryer Pub. Co.* 327

3. Defendant having refused to publish plaintiff's advertising after the original three-year period unless plaintiff would agree in advance to pay a higher rate, and it appearing that an irreparable injury to plaintiff would result from such threatened breach of the contract, and that the damages could not be ascertained under any legal rules, defendant was properly restrained from breaching the contract. *Ibid.*

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For benefit of third persons: Rescission. See BROKERS, 2.

4. If a person makes a contract with another for the benefit of a third person such third person may enforce it whether or not he has formally assented thereto, and neither one nor both of the immediate parties can rescind the contract or in any way interrupt or prejudice the rights of the third person without his consent, unless the right to do so be reserved in the contract. *Micek v. Wamka,* 97

Construction. See BROKERS. DEEDS. EXCHANGE OF PROPERTY. GUARANTY, 1. INSURANCE, 2, 5, 12, 14. VENDOR AND PURCHASER, 6–8.

Entire contracts. See BROKERS, 1.

Building contracts: Making of changes. See SCHOOLS AND SCHOOL DISTRICTS.

Same: Compensation for extra work.

5. In an action to recover for extra and additional work claimed to have been done in performing a contract for the construction

of a sewer, the evidence is *held* to sustain findings of a referee, approved by the trial court, that plaintiff had not sustained his claim except as to two items of extra work, and that as to those there had been no written agreement fixing the price and no presentation of the claim as required by the contract. *Thomsen v. Kenosha,* 204

6. Because of the failure to comply with said conditions of the contract plaintiff was not entitled to compensation for the extra work done. *Ibid.*

Rescission. See BROKERS, 2. CANCELLATION OF INSTRUMENTS. DEEDS, 3–5. VENDOR AND PURCHASER, 8.

Enforcing specific performance. See VENDOR AND PURCHASER, 1, 4, 5, 9, 10.

Breach: Damages. See EXCHANGE OF PROPERTY. VENDOR AND PURCHASER, 11.

7. In an action for breach of a contract by which defendant guaranteed to cure plaintiff of stammering within five weeks or return his tuition fee of $65, the facts that plaintiff was not cured within five weeks and that thereafter, at defendant's request, he continued the treatment for a month or more and then left, having become satisfied that no cure would be effected, did not warrant recovery of any damages beyond the amount of the tuition fee. *Donovan v. Northwestern School for Stammerers,* 331

Impairing obligation of contracts. See STREET RAILWAYS, 3.

CONTRIBUTORY NEGLIGENCE. See AUTOMOBILES, 3. RAILROADS, 16. STREET RAILWAYS, 6.

CONVEYANCES. See CANCELLATION OF INSTRUMENTS. DEDICATION. DEEDS. EASEMENTS. PLATTING LANDS.

CORPORATIONS.

Action by stockholder: Fraudulent conspiracy. See CONSPIRACY.

Officers: President: Authority to commence action.

The president of a corporation, who by the charter or by-laws is given control of every department of the company, has implied authority to commence an action in its name to recover moneys of the corporation which have been converted by its treasurer and manager to his own use. *Green Bay F. Co. v. Jorgensen,* 548

Same: Treasurer and manager: Conversion of corporate funds: Discharge. See MASTER AND SERVANT, 1.

Corporate powers: Franchises. See PUBLIC UTILITIES, 1–8.

Purchase of land. See VENDOR AND PURCHASER, 5.

Foreign corporations: Contracts. See COMMERCE, 2.

Municipal corporations. See MUNICIPAL CORPORATIONS.

COSTS.

In equitable actions: Discretion.

1. In an equitable action where important issues are contested by the defendant the costs are in the discretion of the court; and in this case a judgment for costs against the defendant is *held* not an abuse of discretion. *Chicago, St. P., M. & O. R. Co. v. Bystrom,* 125

2. An appeal from the refusal of a county board to refund a tax paid under protest being in the nature of an equitable action, costs therein may, under sec. 685 and sub. (7), sec. 2918, Stats., in the discretion of the court be awarded against the plaintiff even though he recovers a small overcharge. *Borgman v. Langlade County,* 442

3. Allowance by the trial court of full costs to the defendants in this case was not an abuse of discretion. *Neff v. Barber,* 503

In will cases: Guardians ad litem. See WILLS, 18.

In supreme court: Printing, etc.

4. Upon affirmance of a judgment no costs are allowed to respondents for the printing of a supplemental case consisting almost entirely of exhibits properly referred to in appellants' case. *Neff v. Barber,* 503

Same: Double costs.

5. In an action on behalf of the state to restrain the sale of liquors, where a defendant appealed from an order overruling his demurrer to the complaint, but did not serve or file any printed case or brief on such appeal, double costs are awarded to respondent under sec. 2951, Stats. *State ex rel. Owen v. McIntosh,* 596

Liability of attorneys for costs. See APPEAL, 5.

CO-TENANCY. See HUSBAND AND WIFE, 3. TAXATION, 11, 12.

COUNTERCLAIM. See JUDGMENT, 9.

COUNTIES.

Powers: Keeping abstract books: Uniformity in county government: Register of deeds.

1. The matter of title to lands and abstracts of title being one of public concern, and there being no constitutional provision which expressly or by necessary implication forbids such legislation, the legislature had power to enact ch. 270, Laws 1878, as amended by ch. 200, Laws 1881, which provided, among other things, that a set of abstract books compiled for and purchased by Outagamie county should be a part of the official records of the office of its register of deeds, that they be open to the public under certain specified restrictions, and that the register should keep up and continue such abstracts and should furnish abstracts on payment of prescribed fees, one half thereof to be retained by him and one half to be paid to the county. *Outagamie County v. Zuehlke,* 32

2. Such keeping of abstract books by a county is not a governmental function in the sense that a law authorizing it in a particular county violates the uniformity of the system of town and county government required by sec. 23, art. IV, Const. *Ibid.*

3. While by said ch. 270, Laws 1878, as amended, the abstract books are made a part of the official records of the office of register of deeds, they are made so under the limitations provided therein, and hence the restriction upon their use does not conflict with sec. 700, Stats., which requires that the records in the office of the register of deeds be open to the public without limitation. *Rock Co. v. Weirick,* 143 Wis. 500, distinguished. *Ibid.*

4. Said ch. 270, as amended, does not grant "corporate powers" to a county within the meaning of sec. 31, art. IV, Const.—pro-

hibiting the legislature from enacting any special or private laws granting corporate powers except to cities. *Ibid.*

5. In view of sec. 4987, Stats.,—providing in effect that no special act relating to a particular county shall be deemed to be repealed by the revised statutes, unless enumerated in the acts thereby repealed,—ch. 270, Laws 1878, as amended, was not repealed by the enactment of the revision of 1898. *Ibid.*

6. One who, as register of deeds of Outagamie county, performed the services and received the fees prescribed by said ch. 270, as amended, cannot now allege the unconstitutionality of that statute as a ground for refusing to pay over to the county its proportion of the fees so collected. *Ibid.*

Sale of bonds: Advertising: Computation of time: Resolutions: Reference to committee: Interest on bonds, where payable.

7. Where a resolution of a county board relating to the sale of bonds provided that an advertisement thereof should be published "ten days prior to the sale," the time should be computed as provided in sub. (24), sec. 4971, Stats., by excluding the first day and including the last. *Fletcher v. La Crosse County,* 446

8. *Ward v. Walters,* 63 Wis. 39, so far as it is in conflict with the rule stated in sub. (24), sec. 4971, Stats., overruled. *Ibid.*

9. A rule adopted by a county board to the effect that no resolution appropriating money shall be acted upon by the board without first having been referred to and reported back by a proper committee, applies to a resolution offered by a member relating to a matter not referred to and reported upon by a committee, but not to one reported out by a committee to which had been referred the subject matter to which the resolution relates. *Ibid.*

10. Where a resolution of a county board authorizing the issuance and sale of bonds provided that the principal of the bonds should be payable at the office of the county treasurer, but did not specify at what place the interest should be paid, the interest is payable where the principal is payable, and the resolution is sufficiently definite in that respect. *Ibid.*

COUNTY BOARD. See COSTS, 2. COUNTIES, 9. TAXATION, 13, 14.

COUNTY COURT of Iowa county. See COURTS, 5, 6.

COURTS.

Adherence to rules.

1. Where the enforcement of any rule for the administration of the law will result in a failure of justice, it should be carefully scrutinized and not blindly adhered to. *Cappon v. O'Day,* 486

Supreme court: Original jurisdiction: When exercised.

2. The original jurisdiction of the supreme court will not be exercised in an action affecting only local interests, where there is adequate remedy in the lower courts. *State ex rel. Johnson v. County Boards,* 164

3. So *held* as to an action by *mandamus* to compel the county boards of two counties to keep in repair, as required by ch. 565, Laws 1915, a bridge across a stream forming the boundary between said counties, the public interests involved being local only and the remedy in the circuit court entirely adequate. *Ibid.*

4. Pursuant to sec. 2836*a*, Stats., such action, commenced in the supreme court, is certified to the circuit court for one of the coun-

ties interested, to be tried in that court as if originally brought there—said sec. 2836*a* being construed as applicable to the supreme court as well as to the circuit courts. *Ibid.*

Same: Appellate jurisdiction. See APPEAL AND ERROR. COSTS, 4, 5.

Circuit courts: Jurisdiction. See APPEAL, 10. WORKMEN'S COMPENSATION, 23, 25–27.

Milwaukee civil court. See APPEAL, 10.

Iowa county court: Jurisdiction.

5. An action to restrain town supervisors from removing a fence and opening a highway upon lands occupied by plaintiff not being within any of the classes of cases specified in ch. 339, Laws 1915, the county court of Iowa county had no jurisdiction to enter any judgment or to take any proceeding therein other than to remove the cause to some court having jurisdiction, as provided in sec. 2836*a*, Stats. *Dring v. Mainwaring,* 356

6. The county court of Iowa county had jurisdiction, under ch. 339, Laws 1915, of a taxpayer's action whose primary purpose was to recover on behalf of a city sums alleged to have been unlawfully paid as salaries, although an injunction against future payments was also prayed for. [Whether that court had power to grant such injunctional relief, is not determined.] *Smelker v. Campbell,* 358

Racine municipal court. See CRIMINAL LAW, 1, 2.

CRIMINAL LAW AND PRACTICE.

Venue: Change: Racine municipal court: Circuit court: Discretion.

1. The first sentence in sec. 10 of the act creating the municipal court of Racine county (ch. 72, Laws 1897) is applicable to criminal as well as to civil actions, and the exception therein stated operates to prevent the said court from granting a change of venue in a criminal case to any court of another county; but after the venue in a criminal action has been changed, on the ground of prejudice of the judge, from said municipal court to the circuit court for Racine county, the circuit court may grant a change to another county, under sec. 4679, Stats., upon a satisfactory showing that an impartial trial cannot be had in Racine county. *State ex rel. Carpenter v. Backus,* 179

2. Where, in such a case, a change of venue was asked on the ground last mentioned, it was not error for the circuit court to deny it without prejudice to a renewal of the motion "if it shall appear on the *voir dire* that the defendants . . . cannot have a fair and impartial trial in Racine county." Such an order, not being a final determination of the rights of defendants, does not show an abuse of the discretion vested in the court by sec. 4679, Stats. *Ibid.*

Evidence: Prior convictions.

3. In a criminal prosecution evidence of prior convictions cannot be received unless they are alleged in the information. *Alsheimer v. State,* 646

Statement of district attorney as to prior convictions: Instructions to jury: Prejudicial error.

4. Where prior convictions were not alleged in the information, it was error to permit the district attorney to state, in his opening

remarks, that he would prove such convictions, and such error is *held* in this case to have "affected the substantial rights of" the defendants (sec. 3072*m*, Stats.), it appearing that the evidence upon which they were found guilty was far from conclusive and was such that different juries might very well arrive at different results, and that not until the close of the trial—no evidence of such convictions having been offered—did the trial court instruct the jury to disregard such statement. *Alsheimer v. State*, 646

Assault: Self-defense: Evidence: Instructions to jury. See ASSAULT.

Fraudulently taking female from home.

5. Evidence *held* sufficient to sustain a verdict finding defendants guilty of having fraudulently, deceitfully, and by false representations taken a female from her home for the purpose of unlawful sexual intercourse, contrary to sec. 4581c, Stats. *Weldon v. State*, 452

Pleading. See CRIMINAL LAW, 3.

DAMAGES.

Nominal damages. See APPEAL, 8. LIBEL AND SLANDER, 4. OFFICERS, 4–6.

Grounds and subjects of compensatory damages: Consequential damages. See RAILROADS, 2.

Same: Mental anguish. See TELEGRAPHS.

Same: Aggravation of injury. See TRIAL, 1.

Interest on amount found due.

1. Interest upon the amount found due to plaintiff in an action for legal services was properly allowed from the date of demand by him to the date of the entry of judgment. *Wheelan v. United States F. & G. Co.* 394

Exemplary damages. See LIBEL AND SLANDER, 4.

Measure of damages: Breach of contract. See CONTRACTS, 7. EXCHANGE OF PROPERTY. VENDOR AND PURCHASER, 11.

Same: Death of person: Evidence.

2. In an action for the death of a railway employee it was error to instruct the jury that the damages they might assess could not exceed $10,000; but, the trial court having reduced their award to $7,000, the error in the instruction would not of itself warrant a reversal. *Jacoby v. Chicago, M. & St. P. R. Co.* 610
3. Although in such case the recovery is limited to the pecuniary loss of the wife, evidence as to the number and ages of the children of the deceased was properly admitted. *Ibid.*

Excessive damages.

4. Upon evidence tending to show that plaintiff sustained serious injuries resulting in traumatic neurasthenia, that he lost considerable in weight and was made very nervous, affected with headache, loss of appetite, and suffered much decreased earning power, an award of $1,300, approved by the trial court, is *held* not so excessive as to warrant interference therewith on appeal. *Glasheen v. Wisconsin T., L., H. & P. Co.* 24
5. Where an employee thirty-three years old and earning $4 per day was injured by stepping on a rusty nail and as a result was sub-

jected to six operations, lost two toes and a part of the foot, could not stand on his foot or use it, suffered great pain at all times, and had paid $1,136.35 for surgical attendance and hospital bills up to the time of trial, an award of $7,500 was not excessive. *Kielar v. Fred Miller Brewing Co.* 237

6. An award of $500 for personal injuries is *held* not excessive, where it appeared on the trial, about six months after the accident, that the injuries to plaintiff's right shoulder had not yet healed, that there was an inflammatory condition in the joint, that the chances were the injury to the shoulder would be permanent and entail suffering for a long time, that it was reasonably certain that a painful injury to his wrist would be permanent, and that he was out of work for a period as a consequence of the injury. *Zimmermann v. Mednikoff,* 333

Pleading. See TOWNS, 2.

DAMS. See WATER POWERS.

DEATH.

Presumption: Evidence.

1. There is no presumption of the death of a person until the expiration of seven years after he was last heard from, and after such seven years there is no presumption either of life or of death at any particular time during the seven years, in the absence of evidence raising such presumption. *White v. Brotherhood of Locomotive Firemen,* 418

2. The question at what particular time during said period of seven years a person died is one of fact to be determined by a court or a jury; and in this case the evidence is *held* to sustain a finding by the trial court that the death occurred shortly after the person was last heard from. *Ibid.*

Liability of benefit association. See INSURANCE, 5–7.

Measure of damages. See DAMAGES, 2, 3.

DEBTOR AND CREDITOR. See BILLS AND NOTES, 3, 4. CHATTEL MORTGAGES. DAMAGES, 1. EXECUTORS. GUARANTY. LIMITATION OF ACTIONS, 1. PAYMENT.

DEDICATION.

See PLATTING LANDS.

1. Plaintiff conveyed to defendant a parcel of land by metes and bounds, starting at a point designated on an "assessor's plat" as a lot corner. An adjoining strip was not designated on that plat by name as a street, although it had been so designated on an invalid plat not made by plaintiff, and the city had never accepted it as a street but had treated and assessed it as plaintiff's private property. Defendant did not, at the time, understand that such strip was a street, and he afterwards bought a part of it from plaintiff. *Held,* that there was no dedication by plaintiff of the strip for a street by way of an estoppel *in pais.* *Rau v. Freund,* 27

2. To constitute a dedication of land as a street by way of an estoppel *in pais* it is essential that the donor should intend to set the land apart for the benefit of the public. *Ibid.*

DEEDS.

Delivery to take effect after death.

1. A deed may be delivered by the grantor to a third person for the benefit of the grantee and possession and enjoyment by him of the property involved be postponed until the happening of some special event, such as the death of the grantor, but it is essential that the grantor should absolutely part with control of the instrument and that it should take effect as his deed when so delivered. *Zimmerman v. Zimmerman,* 146
2. Findings of the trial court in this case to the effect that a deed of certain land to the grantor's son, to take effect at her death, and other instruments conveying the rest of her property, all of which were signed by the grantor and placed in the hands of a third person to be retained by him until her death, were intended by her as a testamentary disposition of her property; that she intended to retain control of said instruments, with power to make (as she afterwards did by will) a different disposition of the property; and that a delivery of the deed by the depositary to the grantee was unauthorized, are *held* to be sustained by the evidence. *Ibid.*

Mistake in giving quitclaim deed: Rescission. See CANCELLATION OF INSTRUMENTS.

Recording: Bona fide purchaser. See CANCELLATION OF INSTRUMENTS, 3, 4.

Construction: Description of land. See DEDICATION. PLATTING LANDS, 2. TAXATION, 12.

Same: Easements. See EASEMENTS.

Same: Condition subsequent: Cancellation for breach: Other remedies.

3. A conveyance made by aged people in consideration of support and care may be deemed to be a conveyance upon condition subsequent, and upon proof of a substantial failure to perform will be set aside in a proper case; but that remedy is not exclusive, and other and different relief may be granted when the facts require it in order to do equity between all parties. *Danielson v. Danielson,* 171
4. Whether the parties can be placed *in statu quo* is always an important consideration in such cases. *Ibid.*
5. Two tracts of land, one owned by plaintiff and one by his wife, were conveyed to their son in consideration of his agreement to support and care for them and the survivor of them during life; and a mortgage was given back to secure performance of the agreement. The son performed the agreement for about eight years and until his death, and thereafter his administrator offered or made some effort to perform, but other children of the grantors were compelled to help support them. The parents continued to live upon the premises until the death of the wife, and plaintiff remained thereon afterwards. No claim for a rescission was made by the wife nor by plaintiff until this action was commenced. Upon evidence of the above and other facts it is *held* that cancellation of the deed and restoration of title would be inequitable, and that a foreclosure of the mortgage was properly ordered, with provision for a sale unless certain payments for the support of the plaintiff be made by the heirs or administrator of the son, and a further provision that plaintiff have the use of the premises during his life. *Ibid.*

Tax deeds. See TAXATION, 11–16.

DEFAMATION. See LIBEL AND SLANDER.

DEFAULT. See PLEADING, 1, 2.

DEFINITIONS. See WORDS AND PHRASES.

DELAY. See JUDGMENT, 1. PUBLIC UTILITIES, 3. SCHOOLS AND SCHOOL DISTRICTS, 3.

DELIVERY. See BILLS AND NOTES, 1, 2. DEEDS, 1, 2. SALES, 1, 2.

DEPENDENCY on deceased. See WORKMEN'S COMPENSATION, 21.

DEPOSITIONS.

Examination of adverse party. See DISCOVERY.

Perpetuation of testimony.

1. The old rules of practice governing equitable proceedings to perpetuate testimony have been superseded by the rules embodied in the statutes. *Sioux Land Co. v. Ewing,* 40
2. The facts that there was nothing to interfere with the immediate commencement of an action by the petitioner to quiet title to land, and that the deposition of a witness living without the state might be taken forthwith after the action was begun, did not preclude the granting of a petition for the taking of a deposition to perpetuate the testimony of such witness. *Ibid.*
3. Where it appeared that the evidence might be material, that a long delay might be the cause of losing the testimony of the witness, and that there was no want of good faith in the proceeding, it was within the discretion of the court to hold that the "sufficient cause" required by sec. 4126, Stats., for taking the deposition of such witness had been shown. *Ibid.*
4. It being alleged in the petition that plaintiff was the owner and in possession of the land in question, there was no error in refusing to dismiss the proceeding on the ground that defendant's title to the land had been established by a certain judgment quieting such title as against plaintiff's grantors, a determination of that issue not being necessary in this proceeding. *Ibid.*
5. Objection to the competency of the witness to testify to transactions with a person since deceased may be made at any time when the deposition taken to perpetuate his testimony is offered in evidence; and where some at least of the testimony therein is manifestly not subject to that objection the recording of the deposition should be permitted. *Ibid.*
6. Where the commissioner to take a deposition to perpetuate testimony was expressly authorized to fix the time and place of the taking, such authority was not exhausted by the failure of the witness to appear at the time first fixed, whatever the cause of such failure; and another time might be set. *Ibid.*
7. Where in such case defendants made no application to have an allowance made for their expenses incurred in attending at the time and place first fixed, as a condition for the recording of the deposition, the fact that no such allowance was made cannot, on appeal, affect the question of plaintiff's right to have it recorded. *Ibid.*

DESCRIPTION of land. See TAXATION, 12–14. WILLS, 2.

DIRECTING VERDICT. See MUNICIPAL CORPORATIONS, 15.

DISCHARGE. See MASTER AND SERVANT, 1.

DISCOVERY.

However formally it may be presented, an application to set aside the service of a summons upon the ground that no jurisdiction over the defendant had in fact been obtained thereby, is a mere motion in the action and is not a "proceeding" in which an examination of the adverse party is authorized by sec. 4096, Stats. *Bresadola v. Gogebic & Iron Counties R. & L. Co.* 109

DISCRETION. See COSTS. CRIMINAL LAW, 2. DEPOSITIONS, 3. LIMITATION OF ACTIONS, 6. PLEADING, 1. RECEIVERS, 1. VENDOR AND PURCHASER, 4.

DISTRICT ATTORNEY. See CRIMINAL LAW, 4.

DIVISION OF PROPERTY. See DIVORCE, 1–4.

DIVORCE.

Alimony: Division of property.

1. Under sec. 2364, Stats., a divorce judgment may award alimony to the divorced wife or may make a final division of the husband's estate, but may not do both. *Steinkopf v. Steinkopf,* 224
2. A judgment providing that the husband shall pay to the divorced wife a certain sum per month during her life, as alimony; that the payment of that sum be charged as a lien upon a part of his real estate; and that in addition thereto the wife be awarded the sole use and occupation of the homestead during her life and also be awarded the household furniture, etc., is *held* to have been intended as a judgment making a final division of the husband's estate; and the provision for a monthly payment, being an award of alimony, was an irregularity therein. *Ibid.*
3. The terms of such judgment being definite and unambiguous, the alleged fact—not in any way shown by the record—that it was based upon an oral agreement between the parties cannot be made the basis of a construction of the judgment. *Ibid.*
4. After the death of the husband, who had made the monthly payments without objection during his lifetime, upon a petition for an order terminating the divorced wife's interest in his property it is *held* that the real estate charged with the lien of such payments should be freed therefrom, but that the divorced wife is entitled to hold as her separate property the life estate in the homestead and also the personal property awarded to her by the judgment. *Ibid.*

Same: Modification of judgment: Compensation of guardian ad litem.

5. A judgment can be revised or altered under sec. 2369, Stats., only when the petition is made by a party for revision or alteration in some of the matters enumerated in said section. *Yates v. Yates,* 250
6. An allowance for alimony having come to an end by the death of the divorced wife, and the right to care and custody of a child having been restored to the father, the divorce judgment was, in a special proceeding, so modified as to terminate a trust agreement, made a part of such judgment, under which a fund had been placed in trust to provide for said alimony and the support of the child. *Held,* that when the divorce judgment was so modified it was no longer a judgment for alimony or other allowance for wife or child or for the appointment of a

trustee, and the court could not thereafter, upon petition of the guardian *ad litem*, who had acted for the child in the special proceeding, make the termination of the trust contingent upon the payment of compensation to such guardian. *Ibid.*

Foreign judgment: Enforcement. See JUDGMENT, 11–13.

Marriage of divorced persons. See MARRIAGE, 3–6.

DRAINS.

1. A resolution adopted by the electors at an annual town meeting providing that the town be brought under the county and state drainage system and that the town board should lay out the different districts and fix the number thereof, was not a proceeding had under ch. 54, Stats. 1915, relating to town drains. *Humboldt v. Schoen,* 541
2. Except as otherwise provided by statute for specific drains, such as for highways under sec. 1236, Stats. 1915, the only authority given to a town to provide or pay for a drainage system is that given by ch. 54. Sec. 776 does not give such authority or contemplate the expenditure of town money for a drainage system. *Ibid.*

DUE PROCESS OF LAW. See STREET RAILWAYS, 5. WATER POWERS.

EARNING CAPACITY. See WORKMEN'S COMPENSATION, 17–20.

EASEMENTS.

See BRIDGES. JUDGMENT, 14–16. NAVIGABLE WATERS, 2.

The owner of a right of way across the land of another, whether it was acquired by grant or by prescription, is entitled only to a reasonable and usual enjoyment thereof, in view of all the circumstances of the case and of the use then and theretofore made of the premises affected by it, and the owner of the soil is entitled to all the rights and benefits of ownership consistent with the easement. *Gimbel v. Wehr,* 1

ELECTION as to Compensation Act. See WORKMEN'S COMPENSATION, 8–11.

ELECTRICITY.

Street lighting: Contracts, etc. See MUNICIPAL CORPORATIONS, 3, 4, 7. PUBLIC UTILITIES.

Killing of animal: Evidence.

1. In an action against an electric lighting company for the value of a horse killed by electricity with which a pool of surface water on the street had become charged, a finding by the trial court that the electricity had escaped from defendant's distribution system is *held* to be without support in the evidence. *Bergeler v. Waukesha Gas & E. Co.* 68
2. The burden was upon the plaintiff in such case to prove that the electricity came, as alleged, from defendant's distribution system, and defendant was not bound to establish that—as there was evidence tending to show might have been the case—the electricity came from another source. *Ibid.*

EMBEZZLEMENT. See ATTORNEY AND CLIENT, 4–6. INDEMNITY.

EMINENT DOMAIN. See NAVIGABLE WATERS, 2. RAILROADS, 3, 5, 6.

EMPLOYERS' LIABILITY. See INSURANCE, 14. MASTER AND SERVANT, 3–17. WORKMEN'S COMPENSATION.

ENTICING female from home. See CRIMINAL LAW, 5.

ENTIRE CONTRACT. See BROKERS, 1.

ENTIRETIES: Tenancy by. See HUSBAND AND WIFE, 3.

EQUAL PROTECTION OF THE LAWS. See STREET RAILWAYS, 5. TAXATION, 3. WATER POWERS.

EQUITY. See CANCELLATION OF INSTRUMENTS. CONTRACTS, 3. COSTS. COURTS, 5, 6. DEEDS, 3–5. DEPOSITIONS. DISCOVERY. DIVORCE. JUDGMENT, 3–9. JURY. MECHANICS' LIENS, 5–7. NUISANCE. RECEIVERS. REFORMATION OF INSTRUMENTS. SCHOOLS, 3. TRUSTS AND TRUSTEES. VENDOR AND PURCHASER, 1, 4, 5, 9, 10.

ESTATES.
In land. See WILLS, 8–10, 12, 13, 16, 17.
Of decedents. See EXECUTORS. JUDGMENT, 12, 13. LIMITATION OF ACTIONS. TRUSTS, 2. VENUE, 4. WILLS.

ESTOPPEL.

See DEDICATION. REFORMATION OF INSTRUMENTS, 2. SALES, 1, 2.

An estoppel need not be specially pleaded if the facts showing it are within the issues made by the pleadings and the evidence showing it is admissible for any purpose thereunder. *Hirsch R. M. Co. v. Milwaukee & F. R. V. R. Co.* 220

EVIDENCE.

Presumptions. See CONTRACTS, 1. DEATH, 1. INTOXICATING LIQUORS, 9. JUDGMENT, 10. WILLS, 3.

Burden of proof. See ELECTRICITY, 2. EXECUTORS, 2.

Relevancy, materiality, and competency. See ATTORNEY AND CLIENT, 6. CRIMINAL LAW, 3. DAMAGES, 3. ESTOPPEL. EXECUTORS, 1–3. JUDGMENT, 15. MASTER AND SERVANT, 4. TAXATION, 12. WITNESSES.

Same: Telephone conversations.

1. Where one subscriber to a public telephone exchange calls in the usual way the place of business of another subscriber and some one there undertakes to answer and accept the communication, this is *prima facie* evidence that the message was delivered at that place of business to some one authorized to receive it on behalf of the person or firm to whom the telephone was accredited; and the conversation is admissible in evidence, even though the voice of the person to whom the message was delivered was not identified. *Stein v. Jasculca,* 317

Same: Testimony of physician: Subjective symptoms: Sufficiency of objection.

2. After plaintiff had testified that he visited a physician for treatment and not with a view of using him as a witness, *it seems* that testimony of the physician as to what symptoms plaintiff complained of when he called for treatment was not objectionable. In any event, an objection to the physician's testimony before plaintiff had stated the purpose of his visit, sustained at that time but not renewed after plaintiff had made such statement, was not sufficient. *Glasheen v. Wis. T., L., H. & P. Co.* 24

Documentary evidence: Foreign judgment: Copy: Authentication. See JUDGMENT, 11.

Parol evidence affecting writings. See BILLS AND NOTES, 2. DIVORCE, 3. VENDOR AND PURCHASER, 7.

Weight and sufficiency. See ATTORNEY AND CLIENT, 3–5. AUTOMOBILES, 5. BILLS AND NOTES, 2, 4. CONTRACTS, 1, 5. CRIMINAL LAW, 5. DEATH, 2. DEEDS, 2. ELECTRICITY, 1. FRAUD, 2. GUARANTY, 2, 3. HUSBAND AND WIFE, 2, 3. INDEMNITY. JUDGMENT, 15. MASTER AND SERVANT, 3, 6, 13, 14. NEGLIGENCE, 2. RAILROADS, 10–12, 14, 16. SALES, 4, 5. STREET RAILWAYS, 6. TRUSTS. WILLS, 1–3. WORKMEN'S COMPENSATION, 12.

Perpetuation of testimony. See DEPOSITIONS.

EXAMINATION of adverse party. See DISCOVERY.

EXCEPTIONS. See APPEAL, 2, 3.

EXCESSIVE DAMAGES. See DAMAGES, 4–6.

EXCHANGE OF PROPERTY.

1. Defendant contracted to sell to plaintiff certain lands to which he did not have full title, for a consideration of $66,500 to be paid partly in money and partly by a stock of merchandise and store fixtures and certain real estate subject to incumbrances. The contract provided that "the value of the equities in the real estate and personal property as reckoned in this transaction is $44,500, which leaves a balance of $22,000 due to" defendant; and a date was fixed when "the exchange of properties" was to be made. Defendant was unable to obtain the title necessary to carry out his agreement. *Held*, that as damages for such breach plaintiff was entitled to recover the full value of his bargain. *Lommen v. Danaher*, 15

2. The measure of the damages in such case is the difference between the fair market value, at the time of the breach, of plaintiff's equities in the property he was to transfer to defendant, and the like value at such time of the lands defendant was to convey, less the $22,000 which was to be paid in money, and interest upon said difference from the time of the breach. *Ibid.*

3. The values stated in the contract, not having been specified or intended as fixing the actual values of the respective properties, but as a mere trading basis, were not binding on the parties in respect to damages for the breach of the contract. *Ibid.*

EXCISE LAWS. See INTOXICATING LIQUORS.

EXECUTION of will: Attestation. See WILLS, 3–7.

EXECUTORS AND ADMINISTRATORS.

See LIMITATION OF ACTIONS. TRUSTS, 2. VENUE, 4. WILLS.

Claims against decedents. See JUDGMENT, 12.

1. In an action based upon a claim against a decedent for money paid to him during his life, the question being whether it was a loan to him or a payment on account of an interest retained by him in a mortgage which he had assigned to his daughter (plaintiff's wife), an attorney who, acting merely as a scrivener, wrote a letter for the deceased to the plaintiff relative to the matter, was properly permitted to testify on behalf of defendant to the contents of such letter, but should not have been permitted to tes-

tify as to statements made to him by the deceased at that time. *Lacey v. Estate of Hanrahan,* 352

2. It appearing that the assignment of the mortgage to plaintiff's wife was absolute, the burden was upon defendant to show that the deceased had reserved an interest therein; and that fact could be established in this case only by competent evidence that plaintiff had in some way acknowledged such a claim. *Ibid.*

3. In such a case, statements made by plaintiff's wife to a third person, without his knowledge or authority, did not tend to establish any admission on his part; and statements made by the deceased and not brought home to the plaintiff were equally incompetent and inadmissible. *Ibid.*

Same: Limitations. See JUDGMENT, 13.

4. Sec. 3841, Stats. 1915, providing that no claim barred by the statute of limitations shall be allowed by the county court against an estate, is limited by its terms to claims presented in that court and has no application to an action brought in circuit court before the death of the testator. *Dreger v. Tarrant,* 414

EXEMPLARY DAMAGES. See LIBEL AND SLANDER, 8.

EXEMPTIONS. See TAXATION, 1–5.

EXTRA WORK: Compensation. See CONTRACTS, 5, 6.

FEDERAL AND STATE STATUTES. See MASTER AND SERVANT, 5–12. TELEGRAPHS.

FEES. See OFFICERS, 3.

FELLOW-SERVANTS. See MASTER AND SERVANT, 12.

FENCES. See COURTS, 5. RAILROADS, 7–15.

FIDELITY BONDS. See ATTORNEY AND CLIENT, 3–6. INDEMNITY.

FILING of chattel mortgages. See CHATTEL MORTGAGES.

FINDINGS OF FACT: Supplying omission. See APPEAL, 6. WORKMEN'S COMPENSATION, 28.

FIREARMS. See ASSAULT.

FIRE INSURANCE. See INSURANCE, 1–3.

FORECLOSURE.
Of land contract. See VENDOR AND PURCHASER, 10.
Of lien. See MECHANICS' LIENS, 5–7.
Of mortgage. See CONSPIRACY. DEEDS, 5.

FOREIGN CORPORATIONS. See COMMERCE, 2.

FOREIGN JUDGMENTS. See JUDGMENT, 10–13. MARRIAGE, 4, 5.

FOREIGN STATUTES. See JUDGMENT, 10. MARRIAGE, 3–6.

FRANCHISES. See PUBLIC UTILITIES, 1–8. WATER POWERS.

FRAUD.

See INSURANCE, 3. JUDGMENT, 7. MASTER AND SERVANT, 2. MUNICIPAL CORPORATIONS, 4.

1. In an action to recover a deposit which had been made by plaintiffs to apply on the purchase price of bonds to be issued by the defendant, but which was to be returned if the legality of the bonds was not approved by plaintiffs' attorneys, a verdict finding that an adverse opinion of the attorneys was given "in bad faith and for the fraudulent purpose of giving the plaintiffs an excuse for refusing to accept the bonds," is *held* to be without support in the evidence. *Kinnicutt v. Joint School Dist.* 654

2. Fraud must be shown by clear and satisfactory evidence. *Ibid.*

FRAUDS, STATUTE OF. See CONTRACTS, 1. SALES, 1. VENDOR AND PURCHASER, 1, 2, 6.

FREIGHT. See CARRIERS, 1, 2.

GENERAL APPEARANCE. See APPEARANCE.

GENERAL CHARTER LAW: Adoption in part. See MUNICIPAL CORPORATIONS, 1, 2.

GIFTS. See BILLS AND NOTES, 1, 2. HUSBAND AND WIFE, 2, 3.

GOOD FAITH. See OFFICERS, 5–7.

GRADE of street: Change. See MUNICIPAL CORPORATIONS, 8–11.

GRAIN ELEVATORS: Occupation tax. See TAXATION, 1–3.

GROSS NEGLIGENCE. See NEGLIGENCE, 4–6. PHYSICIANS AND SURGEONS.

GUARANTY.

Contract: Offer and acceptance: Evidence.

1. A letter from defendant to plaintiff stating, "I will guarantee your account with T. up to $250. My understanding being that settlements will be made on the first and fifteenth of each month," is *held* to have been intended as a guaranty of payment of any unpaid part, up to $250, of T.'s account for goods purchased from plaintiff; and when accepted by plaintiff was operative until revoked. *Thiensville C. Co. v. Hickcox,* 537
2. A finding by the trial court to the effect that, although there was no formal acceptance of such guaranty and notice thereof to defendant, yet the parties dealt with each other as if formal notice had been given, and that defendant had actual notice of such acceptance, is *held* to be sustained by the evidence. *Ibid.*
3. There being evidence tending to show that the amount due on T.'s account on the 15th of one month was paid by a check signed by defendant and delivered to plaintiff by T., defendant's denial that he had signed and issued any such check was not conclusive upon the court. *Ibid.*

Rights of guarantor as to security: Application of payments.

4. The rights of a guarantor of one of several notes secured by a chattel mortgage could not be impaired or diminished by any contract made between the mortgagor and the mortgagee subsequent to the making of the guaranty. *International Harvester Co. v. Holmes,* 506
5. A chattel mortgage gave the mortgagee power, in case of a default in payment of any of the notes secured thereby, to declare the whole debt due and to take and sell the property. Without attempting to proceed under such power, the mortgagee, after two of the four notes secured had become due, procured from the mortgagor an agreement authorizing him to sell the property and apply the proceeds upon any of the notes without affecting liability on the others. *Held,* that as against a guarantor of one of the notes already due such agreement was of no effect, and that the proceeds of a sale thereunder must be applied upon the notes in the order of their maturity. *Ibid.*

GUARDIANS AD LITEM: Compensation: Costs. See DIVORCE, 6. INFANTS. WILLS, 18.

GUARDING dangerous machinery. See NEGLIGENCE, 3, 4. WORKMEN'S COMPENSATION, 15.

HARMLESS ERRORS. See APPEAL, 8, 9.

HEARING. See WORKMEN'S COMPENSATION, 22, 23.
HERNIA. See WORKMEN'S COMPENSATION, 6.

HIGHWAYS.

Dedication. See DEDICATION. PLATTING LANDS.
Bridges. See BRIDGES. NAVIGABLE WATERS, 2.
Rights of abutting owners. See MUNICIPAL CORPORATIONS, 8–11, 14. RAILROADS, 2–6.
Injuries from defects. See MUNICIPAL CORPORATIONS, 15.

1. Under sec. 1339, Stats.—giving a right of action for an injury to person or property caused by the insufficiency or want of repair of a highway "in any town,"—where an injury is caused by a defect at a point where a highway intersects the boundary line between two towns, such towns, being both in duty bound to keep the highway in a reasonably safe condition at that point, are jointly and severally liable for the injury and an action may be maintained against either or both. *Trebowoski v. Ringle,* 637
2. An imperfection in a highway which is outside of the ordinary course of travel and the place prepared therefor, and not so near thereto or so connected therewith as to render such place not reasonably safe, is not an actionable defect. *Kuchler v. Milwaukee,* 320

HIRING. See MASTER AND SERVANT, 3, 4.

HOSPITALS.

1. A finding that surgeons who operated upon plaintiff at a hospital were negligent in permitting certain nurses to attend him after the operation, is *held* to have been properly set aside by the trial court, there being no evidence to show that, even if the nurses were incompetent, the surgeons—who were not agents or servants of the hospital—knew or were chargeable with knowledge of such incompetency. *Morrison v. Henke,* 166
2. Charitable hospitals are not liable to their patients for negligence of employees selected with due care. Such hospitals perform a *quasi*-public function in ministering to the poor and sick without any pecuniary profit to themselves, and the doctrine of *respondeat superior* should not be applied to them in favor of those receiving their charitable services. *Ibid.*
3. The exemption of such hospitals from liability applies to pay as well as to free patients. *Ibid.*

HUSBAND AND WIFE.

See BILLS AND NOTES, 3. DIVORCE. EXECUTORS, 3. INSURANCE, 8. MARRIAGE. TRUSTS, 2. WILLS, 15–17.

Note of married woman: Validity.

1. Where the maker of a note was a widow and had separate estate at the time the note was in fact made, it is immaterial that at the date of the note she was a married woman with no separate property or business. *Becker v. Noegel,* 73

Gift from husband to wife: Acceptance: Tenancy by entireties: Survivorship.

2. Where a note and mortgage securing a loan made by a husband were made out in the name of his wife at his direction and were

kept in a box at their home, accessible to both, and the mortgagor afterwards paid the interest to the wife and took her receipt therefor, these facts establish a completed gift to the wife, her knowledge, acceptance, and possession of the securities being clearly shown. *Tobin v. Tobin*, 139 Wis. 494, distinguished. *Dupont v. Jonet*, 554

3. Husband and wife went to a bank together, where he surrendered certificates of deposit which were in his name and had new certificates made out in his and her names jointly, payable to either. They received such certificates, took them home, and kept them until his death in a box accessible to both or either at any time. *Held*, that there was a completed gift to the wife of an undivided interest in the fund; that a tenancy by entireties was created; and that upon the husband's death the wife took the whole by right of survivorship. *Ibid.*

IMPAIRING OBLIGATION OF CONTRACTS. See STREET RAILWAYS, 3.

IMPLIED CONTRACTS. See RAILROADS, 5.

IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 12.

INDEMNITY.

See ATTORNEY AND CLIENT, 3–6. INSURANCE, 14.

1. In an action on a fidelity bond insuring the plaintiff bank against loss from any acts of its cashier amounting to larceny or embezzlement, the evidence is *held* to establish that the plaintiff's officers knew all the facts relating to the alleged misappropriations of its funds by the cashier and treated them as loans, and hence that no liability of the surety was shown. *Eland State Bank v. Massachusetts B. & I. Co.* 493

2. The evidence of plaintiff's officers in such case, consisting of general denials of knowledge of material facts which it was their duty as such officers to know, is *held* to have been incredible and without any probative force when taken in connection with the particular facts admitted by them and with undisputed documentary evidence consisting of "call reports," reports of committee to bank and banking commissioner, declarations of directors, account books of the bank, and certificates given by the bank to the bonding company to obtain renewals of the bond. *Ibid.*

INDEPENDENT CONTRACTORS. See MASTER AND SERVANT, 3. WORKMEN'S COMPENSATION, 12.

INDETERMINATE PERMIT. See PUBLIC UTILITIES, 1–4.

INDICTMENT AND INFORMATION. See CRIMINAL LAW, 3, 4.

INDUSTRIAL COMMISSION. See WORKMEN'S COMPENSATION, 15, 16, 22–28.

INFANTS.

Guardians ad litem: Compensation, etc. See DIVORCE, 6. WILLS, 18.

In the absence of special legislative authority, no compensation can be allowed to an unsuccessful guardian *ad litem*, payable out of the fund under the control of the court, in excess of taxable costs or a sum in the nature thereof as taxed between party and party. *Yates v. Yates*, 250

INFORMATION. See CRIMINAL LAW, 3, 4.

INJUNCTION. See CONTRACTS, 3. COURTS, 5, 6. INTOXICATING LIQUORS, 3, 11. JUDGMENT, 3, 5, 9. RAILROADS, 3. SCHOOLS AND SCHOOL DISTRICTS, 3.

INSTRUCTIONS TO JURY. See ASSAULT, 2. CRIMINAL LAW, 4. DAMAGES, 2. TRIAL, 1.

INSURANCE.

Fire: Unlicensed companies: Liability of agent.

1. Under sec. 1919*f*, Stats., imposing a contingent liability upon any person who shall "solicit or place insurance" in a fire insurance company not authorized to do business in this state, one who so places insurance, even though he did not solicit it, is subject to such liability. *Case v. Meany*, 143

Same: Validity of policy: "Sole and unconditional ownership."

2. Where the insured was in possession under a land contract which would entitle him, on payment of a certain sum, to an absolute conveyance of the premises, and had paid the accruing interest, and nothing had been done to forfeit or lessen his rights, he was in such a position that the proceeds from the policy would belong to him and was the sole and unconditional owner of the premises within the meaning of the policy. *Case v. Meany*, 143
3. Where in such case there was no concealment or misrepresentation as to any facts concerning the title when the policy was issued, the policy could not be avoided by the insurance company. *Ibid.*

Accident: Notice of injury: Waiver of claim.

4. An accident insurance certificate issued by a fraternal benefit society provided that failure of the insured to send notice of an accident, within ten days thereafter, to the supreme secretary should constitute a waiver of the claim. The insured suffered an injury which he supposed to be trivial, but nine days later learned that it was serious. Although he was then able and had time to give the notice within the ten-day period, he did not do so, but did give it within ten days after he learned that the injury was serious. *Held*, that under such circumstances he was bound by the literal terms of the contract and had waived his claim. *Graves v. United Commercial Travelers*, 427

Life: Benefit association: Disappearance of insured: Duty of officers: Assessments paid after death: Recovery.

5. A certificate of insurance issued by a fraternal benefit society provided that "all rights of action by the beneficiary . . . shall be absolutely barred unless proof of death . . . shall be made within sixty days from the time said beneficiary has acquired knowledge of the fact of the death of said member." The member disappeared, having been last heard from in 1901. In an action brought upon the certificate in 1915, defendant denied that the member was dead. The court found that the beneficiary had no knowledge of the death; that all the facts as to the disappearance were known to the secretary of the local lodge and had been by him laid before the grand secretary of the society; and that payment of the dues and assessments had been continued by the advice of the officers of the lodge. Both parties considered the contract valid up to the time the action was brought. *Held*, that defendant could not repudiate it under the provision above quoted. *White v. Brotherhood of Locomotive Firemen*, 418

6. It being the duty of the officers of the local lodge, under the by-laws of the society, to make the certificate and proofs of death in such a case, it was not necessary, in view of the knowledge which those officers and the grand secretary possessed, that the beneficiary should have given formal notice to the society of the disappearance of the insured. *Ibid.*

7. Assessments paid by the beneficiary after the death of insured and before her own death were recoverable in the action brought by the administrators of the beneficiary. *Ibid.*

Same: Rights of beneficiary: Change.

8. As to a fraternal benefit certificate issued prior to the enactment of ch. 376, Laws 1891 (amending sec. 2347, Stats.), that statute did not take away the vested right of the assured to change the beneficiary named, even though she was his wife; nor did sec. 3, ch. 175, Laws 1895 (sub. 5, sec. 1957, Stats.), change in any way the rights of the assured to deal with such a certificate. *Suelflow v. Supreme Lodge, K. & L. of H.* 291

9. Where the manner of making a change of beneficiaries is not prescribed in the benefit certificate nor in the constitution, by-laws, or regulations of the society, any definite designation of a different beneficiary will suffice. *Ibid.*

10. When the beneficiary named in a fraternal benefit certificate had a mere expectancy of which she might at any time be deprived by the act of the assured without her consent, she cannot during the life of the assured maintain an action for damages on the ground that the society has wrongfully canceled the certificate. *Ibid.*

11. The beneficiary named in a certificate issued to a member of a fraternal benefit society does not acquire absolute and indefeasible rights until the death of the member. *Malancy v. Malancy,* 642

12. A by-law of such a society, providing that any agreement entered into by a member not to change the beneficiary shall be null and void, and the statute (sub. 5, sec. 1957, Stats.) providing that he may change the beneficiary named without the consent of such beneficiary, become part of the terms and conditions of the certificate. *Ibid.*

13. The fact that a change of the beneficiary in such a certificate was made by the member for a valuable consideration paid to him did not give the second beneficiary any legal or equitable right to the proceeds of the certificate as against the person in whose favor another change was afterwards made by the member in accordance with the by-laws of the society. *Ibid.*

Indemnity: Employers' liability: Misnomer of insured. See REFORMATION OF INSTRUMENTS.

Same: Condition of liability: Payment "in money."

14. Where an award to an injured employee was paid to him partly in cash, and the remainder ($450) by the conveyance to him of land of the fair market value of $450, which he wished to purchase and which it was agreed that he would accept in lieu of said sum, and there was nothing to indicate collusion or bad faith in the transaction, there was a substantial compliance with a condition in an indemnity insurance policy that the loss should have been paid by the employer "in money." *Komula v. General Accident, F. & L. A. Corp.* 520

Action on policy: Where cause of action arises. See VENUE, 2–5.

INTEREST. See COUNTIES, 10. DAMAGES, 1.

INTERSTATE COMMERCE. See COMMERCE. MASTER AND SERVANT, 5–12. TELEGRAPHS.

INTOXICATING LIQUORS.

Licenses to sell: Number that may be granted.

1. Where, pursuant to a vote of the electors, no licenses are granted in a village for a year or more, rights as to the granting of licenses under the proviso in sec. 1565*d*, Stats., lapse during such no-license period, and thereafter but one license may be granted in that village for each 500 inhabitants or fraction thereof. *State ex rel. Owen v. Schotten,* 88

2. The saving clause or proviso in sec. 1565*d*, Stats. 1915,—protecting existing licenses equal in number to those in force at a certain date,—is inoperative after a no-license period. *State ex rel. Owen v. Reisen,* 258

3. The saving clause in sec. 1565*dd*, Stats. 1915 (Laws 1915, ch. 453, sec. 2), is not applicable where, by reason of an injunction, a village board could not and did not fulfil the conditions of that clause by granting licenses within thirty days from the passage of said ch. 453. *Ibid.*

4. Where neither of the saving clauses above mentioned was operative, but one license could be granted in 1916 in a village having less than 500 inhabitants. *Ibid.*

5. Where a village board, having power to grant but one license, granted three in a single motion, all must be held illegal because it cannot be said that any one of them was granted before the others. *Ibid.*

6. Under sec. 1565*d*, Stats. 1915, but one license to sell liquors can be granted in a city unless its population exceeds 500, as shown by the last preceding national census or official estimate thereof made by the bureau of the census of the United States government. The facts that there has been no such census since the city was incorporated, and that to enable it to incorporate there must, under sec. 925—9, Stats., have been a population of 1,500 within the proposed city limits, do not affect the rule. *State ex rel. Owen v. McIntosh,* 596

Same: Method of granting: Vote required, etc. See INTOXICATING LIQUORS, 5. MUNICIPAL CORPORATIONS, 6.

7. Under sub. (1), sec. 925—52, Stats., providing that no license to sell liquor in a city organized under the general charter law shall be granted except by a majority vote of all the members of the common council, and sec. 925—49, providing that the mayor shall not be counted in determining such a majority, a license could not be granted, where, four aldermen and the mayor being present, two aldermen voted "No" and two aldermen and the mayor voted "Yes." *State ex rel. Owen v. McIntosh,* 596

Nature of license: Assignment: Liability of holder.

8. A retail liquor license is a mere privilege to be enjoyed while the conditions and restrictions are complied with, implies special confidence and trust in the licensee, and can be assigned only as provided in the statute. *John Barth Co. v. Brandy,* 196

9. One who has obtained and holds a retail liquor license is responsible for whatever is done in that place of business by his agents, and must be presumed to be the owner and keeper of the saloon as to the general public and persons dealing with those conducting the business. *Ibid.*

10. Thus, where B. personally obtained and held a license, although he did so for the purpose of helping one S. who ran the saloon for his own profit, he is personally liable for liquors sold to S. for such saloon, and it is immaterial whether the seller knew, at the time of the sale, that S. claimed to be the owner in fact of the business. *Ibid.*

Unlawful sale: Nuisance: Injunction. See COSTS, 5.

11. Whenever any place is used for the unlawful sale of liquor, an action under sec. 3180*a*, Stats. 1915, to enjoin it as a public nuisance may be maintained, although there has been no criminal conviction of the keeper of the place. *State ex rel. Owen v. Reisen,* 258

IOWA COUNTY COURT: Jurisdiction. See COURTS, 5, 6.

JOINDER.

Of causes of action. See NEGLIGENCE, 4, 6. PHYSICIANS AND SURGEONS.

Of parties. See HIGHWAYS, 1. TAXATION, 9.

JOINT AND SEVERAL LIABILITY. See HIGHWAYS, 1.

JUDGMENT.

Form: Essentials: Signature of judge. See JUDGMENT, 10.

In divorce actions. See DIVORCE.

Construction. See DIVORCE, 2, 3. JUDGMENT, 14–16.

Modification. See DIVORCE, 4–6.

Opening or vacating. See APPEAL, 4. APPEARANCE, 2, 3.

1. Where a party asking that a judgment obtained against him without jurisdiction of his person be set aside stands purely on his legal right, mere delay or acquiescence after discovery of the existence of the judgment will not bar the remedy unless it continued so long as to defeat the right itself. *Driscoll v. Tillman,* 245

2. A petition in the action in which the judgment was rendered is a proper remedy in such a case. *Ibid.*

Equitable relief: Remedies: Bill of review: Restraining enforcement.

3. Relief against a judgment upon any ground can be had only pursuant to the Code procedure in the ways prescribed in sec. 2832, Stats., or by motion for new trial under sec. 2879, unless the facts are such as to warrant relief in a direct action to restrain a party from reaping the fruits of an unconscionable judgment. *Gimbel v. Wehr,* 1

4. The abolition of the ancient bill of review in equity did not abrogate any of the remedial rights formerly enforced thereby. *Washburn L. Co. v. White River L. Co.* 112

5. When the methods expressly provided in the statutes for obtaining relief against a judgment are not available, equitable relief against an unjust and unconscionable judgment by way of restraining the party who seeks to enforce it may be invoked under the Code procedure in all appropriate cases. *Ibid.*

6. The foregoing rule is applicable to judgments in all civil actions whether the rights of the parties determined by such judgments arose at law or in equity. *Ibid.*

7. Such equitable relief against an unconscionable judgment may be invoked not only in cases of fraud but also upon the grounds of accident and mistake. *Ibid.*

8. Thus, allegations to the effect that a tax upon land was in fact paid in 1888, but by mistake was returned as delinquent and the land sold therefor and a tax deed thereafter wrongfully issued; that the owner of the land at the time said tax was paid and a grantee of such owner continued in possession of the land and paid the taxes thereon without knowledge of any adverse claim until 1912; that upon discovery of the existence of the tax deed an action to quiet title was brought, but, by reason of the mistake of the taxing officers above stated and the accidental loss of the tax receipt by the former owner, without fault or negligence on the part of the plaintiff in that action the facts could not be proved and judgment was consequently entered quieting the title in the tax-title claimant; and that the tax receipt has since been found—state facts upon which equitable relief may be granted against said judgment. *Ibid.*

9. Such facts were properly pleadable as a counterclaim, under sec. 2656, Stats., in an action for trespass brought by the tax-title claimant against the plaintiff in the former action. *Ibid.*

Conclusiveness: Res judicata. See DEPOSITIONS, 4.

Foreign judgments: Essentials: Authentication: Enforcement in this state: Limitations.

10. The judgment of a court of this state is valid without the signature of the trial judge; and in the absence of evidence to the contrary it must be presumed that the law governing such records is the same in Illinois as in this state. *Will of Burghardt,* 312

11. Had proper objection been made it would have been error to admit in evidence in a court of this state a document purporting to be a copy of a divorce judgment of an Illinois court, but not authenticated in either of the methods authorized by sec. 4145, Stats.; but, it appearing that counsel objecting to its admission stated that he did not care to press his objection that it was not properly certified, that a letter from the defendant in the divorce action recognizing the existence of the judgment was subsequently received in evidence without objection, and that payments had been made by such defendant in accordance with the terms of the judgment, it was not error to consider the copy of the judgment as properly before the court. *Ibid.*

12. Although an Illinois judgment of divorce requiring the husband to pay a weekly sum, not as alimony for the wife, but for the support of a minor child whose custody was awarded to her, did not fix in absolute terms the total amount due or to become due, and could not be docketed as a money judgment enforceable by execution, yet, the husband having since died, so that no modification of the judgment as to such allowance could be made by the Illinois court, and the amount unpaid during his lifetime being a mere matter of computation, the judgment was a proper basis for a claim enforceable in this state against the estate of the husband, who resided here at the time of his death. *Ibid.*

13. The statute of limitations—sub. (1), sec. 4221, Stats.—bars a recovery in such case only of the weekly payments which fell due, under the terms of the judgment, ten years or more prior to the death of the defendant in the divorce action. *Ibid.*

Enforcement: Compelling performance of acts: Construction.

14. In a proceeding under sec. 2966, Stats., to enforce a judgment which required the performance of an act other than the payment of money or delivery of property,—*i. e.* that an alley over certain land, twenty feet wide and eight feet high, should be "opened and made practicable,"—the court properly examined the pleadings in the action wherein such judgment was rendered, and also certain agreements referred to in the judgment, for the purpose of ascertaining its meaning and effect. *Gimbel v. Wehr,* 1

15. Where the specification in such judgment as to the width of the alley was, as shown by the record, not intended to be a determination that certain encroachments upon such width by walls, columns, etc., were unlawful, the court, in the proceeding to enforce the judgment, properly received and considered evidence as to the nature and extent of such encroachments and their effect on the use and practicability of the alley; and such evidence is *held* to support a finding that the encroachments within the limits of the alley do not affect its practical usefulness nor invade the rights of abutting owners. *Ibid.*

16. It further appearing that the grade of the alley is substantially as it was at the time of a certain agreement referred to in the judgment, and that any variation thereof would violate the right confirmed by such agreement, it is *held* that the order of the court fixing the grade as it now is correctly interprets the judgment. *Ibid.*

Direction, by appellate court, as to judgment. See RAILROADS, 13.

JURISDICTION.
Supreme court. See COURTS, 2–4.
Circuit courts. See APPEAL, 10. APPEARANCE. DISCOVERY. WORKMEN'S COMPENSATION, 23, 25–27.
County court of Iowa county. See COURTS, 5, 6.
Justices' courts. See LIBEL AND SLANDER, 1.
Railroad commission. See PUBLIC UTILITIES, 9, 10. RAILROADS, 1. STREET RAILWAYS, 4. WATER POWERS.
Tax commission. See TAXATION, 7, 8.
Industrial commission. See WORKMEN'S COMPENSATION, 16, 22.

JURY.

Right to jury trial: Equitable actions.

1. The right to trial by jury does not extend to equitable actions; and all issues therein, whether legal or equitable, are triable by the court. *Neff v. Barber,* 503

2. Although the issue as to a conspiracy was one at law, plaintiff was not entitled to a jury trial thereof as a matter of right, where the action was an equitable one. *Ibid.*

Questions for jury. See TRIAL.

Instructing jury. See TRIAL.

JUSTICES' COURTS. See LIBEL AND SLANDER, 1.

LACHES. See OFFICERS, 8. PUBLIC UTILITIES, 3. SCHOOLS, 3.

LAND CONTRACT. See BROKERS. EXCHANGE OF PROPERTY. INSURANCE, 2, 3. VENDOR AND PURCHASER.

LANDLORD AND TENANT. See MECHANICS' LIENS, 3, 4.

LANDS SOLD FOR TAXES. See TAXATION, 11–16.

LARCENY. See INDEMNITY.

LEASES. See MECHANICS' LIENS, 3, 4.

LEGISLATIVE POWERS. See CONSTITUTIONAL LAW.

LIBEL AND SLANDER.

Actionable publications: Reports of judicial proceedings.

1. A newspaper publication stating that plaintiff had been tried before a justice of the peace for the theft of a harness and had been found guilty and fined was "a true and fair report" of a judicial proceeding, within the meaning of sec. 4256*a*, Stats., and therefore not actionable, although in fact the judgment pronounced by the justice was void for want of jurisdiction because no complaint had been filed as required by law. *Hahn v. Holum*, 425

Same: Questions for jury: Harmless errors in submitting.

2. Although a newspaper publication concerning plaintiff was libelous *per se*, the error in submitting to the jury the question whether it was libelous or not was not prejudicial to plaintiff where the jury found it libelous and awarded damages. *Fontaine v. Cooley*, 404
3. Certain other newspaper publications concerning plaintiff not being libelous *per se*, the submission to the jury of the questions whether they were libelous and whether they were true, and the admission of evidence as to those issues, was not error. *Ibid.*

Damages.

4. In an action for libel punitory damages cannot be recovered where the compensatory damages are merely nominal. *Barnard v. Cohen*, 417

LICENSES. See INTOXICATING LIQUORS. MUNICIPAL CORPORATIONS, 6.

LIENS.
Of judgments. See DIVORCE, 2, 4.
Of attorneys on recovery. See APPEAL, 5.
Of mechanics, etc. See MECHANICS' LIENS.

LIFE ESTATE. See WILLS, 8, 12, 16, 17.

LIFE INSURANCE. See INSURANCE, 5–13.

LIMITATION OF ACTIONS.

See EXECUTORS, 4. JUDGMENT, 13. MECHANICS' LIENS, 6. MUNICIPAL CORPORATIONS, 1. TAXATION, 9.

Claim against decedent: Payments.

1. In an action for the reasonable value of services rendered by a son for his father, it appearing that the services continued from 1880 up to the death of the father in 1913; that payments were made to the son from time to time in money and during all the time in board and keep; and that a claim for such services was seasonably filed against the father's estate, the statute of limitations does not apply. *Laughnan v. Estate of Laughnan*, 348

Action to question validity of adoption of part of general charter. See MUNICIPAL CORPORATIONS, 1.

Action for an injury to the person: Notice.

2. Service of the notice provided for in sub. (5), sec. 4222, Stats., is a condition precedent to the maintenance of any "action to recover damages for an injury to the person," irrespective of the form of the action. *Klingbeil v. Saucerman,* 60

3. Whether it be in tort or on contract an action against a physician for malpractice whereby bodily injuries were inflicted is an "action to recover damages for an injury to the person" within the meaning of sub. (5), sec. 4222, Stats. *Ibid.*

4. The C. & M. E. *Railway* Co. operates wholly within the city of Milwaukee, while the C. & M. E. *Railroad* Co. (in the hands of receivers) operates interurban cars but runs them in Milwaukee over the tracks of the *Railway* Co. Plaintiff was injured while alighting in Milwaukee from a car of the *Railroad* Co. Action was commenced against the *Railway* Co. Within two years after the accident an amended summons and complaint were served on a ticket agent who represented both the *Railway* Co. and the receivers of the *Railroad* Co. The papers were entitled as in an action against the *Railway* Co. and certain persons as receivers of the *Railway* Co.—such persons being however, in fact, the receivers of the *Railroad* Co. The allegations of the amended complaint were such that it could have no application to any corporation other than the *Railroad* Co. and its receivers; and the receivers were in no way misled by the misdescription. *Held,* that such complaint was a sufficient notice of the injury, under sec. 4222, Stats., to the receivers of the *Railroad* Co. *Maxwell v. Johnson,* 462

Pleading: Waiver of defense: Amendment: Discretion.

5. Failure of the defendant in this case to plead the statute of limitations either by an answer or by demurrer was a waiver of that defense. *Dreger v. Tarrant,* 414

6. The original defendant having died after the trial of the case before a referee, and her executor, after the action had been revived, having adopted and stood upon her answer, which did not plead the statute of limitations, there was no abuse of discretion in refusing to set aside the waiver and permit such statute to be pleaded by the executor after the case had been tried a second time and was ready for final judgment. *Ibid.*

LIQUORS: Sale: Licenses. See INTOXICATING LIQUORS.

LOGS AND TIMBER. See TROVER AND CONVERSION.

MALFEASANCE. See OFFICERS, 7, 8.

MALPRACTICE. See LIMITATION OF ACTIONS, 3. PHYSICIANS AND SURGEONS.

MANDAMUS. See COURTS, 3. OFFICERS, 1, 2.

MARRIAGE.

See WORKMEN'S COMPENSATION, 21.

1. The general rule that a marriage valid where solemnized is valid everywhere has its exceptions where unusual circumstances would render its application inequitable or contrary to a declared public policy or to good morals. *Hall v. Industrial Comm.* 364

2. It is the public policy of this state, declared in sec. 2330*m*, Stats. 1915, that marriages contracted without the state by residents hereof not qualified to marry within the state, and marriages contracted within the state by nonresidents not qualified to marry in their own state, shall be null and void. *Ibid.*

3. The law of Illinois forbidding divorced persons to marry again within one year being substantially the same as the law in this state and having received the same construction—to the effect that marriages contracted without the state to evade the statute are void,—the courts of this state will take cognizance of an evasion and infraction of such Illinois law and apply the same rule thereto as would be applied to a violation of our own law on that subject. *Ibid.*

4. Thus, where an Illinois court, upon granting a divorce, decreed that neither party marry again within the year limited by the statute, but the divorced wife, for the purpose of evading such disability, went to Indiana and married within the year, and thereafter removed to Wisconsin, such marriage will not be recognized in this state. *Ibid.*

5. The status of the divorced wife, having been declared and fixed by a court of competent jurisdiction in accordance with a sound public policy, should be recognized and held to be the same in, at least, all states having the same or similar laws. *Frame v. Thormann*, 102 Wis. 653, distinguished. *Ibid.*

6. A marriage illegal in its inception cannot become valid in this state except by the establishment, either directly or circumstantially, of an actual contract of marriage after the removal of the impediment which rendered it illegal in the first instance, —mere cohabitation as husband and wife not being sufficient. *Ibid.*

MARRIED WOMEN. See DIVORCE. HUSBAND AND WIFE.

MASTER AND SERVANT.

The relation: Employee or independent contractor? See MASTER AND SERVANT, 4. WORKMEN'S COMPENSATION, 12.

Same: Who is employer. See MASTER AND SERVANT, 3, 4.

Discharge of employee: When justified.

1. A wilful conversion of corporate funds to his own use by the treasurer of a corporation who was also employed as its manager justified his discharge as a matter of law, especially where such misappropriation of the funds was contrary to the express direction of the president of the corporation. *Schumaker v. Heinemann*, 99 Wis. 251, distinguished. *Green Bay Fish Co. v. Jorgensen*, 548

Services and compensation. See BILLS AND NOTES, 4. CONTRACTS, 1. LIMITATION OF ACTIONS, 1.

2. In an action to recover the value of services as a farm hand, the evidence is *held* to sustain a finding by a referee, confirmed by the trial court, to the effect that there was fraud on the part of the employer in procuring the execution by plaintiff of receipts which purported to be in full of all demands. *Dreger v. Tarrant*, 414

Master's liability for injuries. See WORKMEN'S COMPENSATION.

Same: Who is employer: Independent contractors.

3. While engaged with a crew of men in decking or piling logs in Michigan plaintiff was injured by the falling of a log which was prematurely released as it was being hoisted to the pile. One C. was in charge of the work under a contract with defendants pursuant to which he boarded and paid the men and was to be paid a certain sum per thousand; but evidence as to the control exercised by defendants over the piling crew and as to liability insurance procured by defendants covering such crew, together with certain admissions in the original answer, is *held* to sustain a finding by the jury that both plaintiff and C. were servants of the defendants at the time of the injury; and C. was therefore not such an independent contractor that defendants were relieved from liability to plaintiff under the Michigan rule on that subject, which seems to be substantially the same as the rule in this state. *Sempier v. Goemann,* 103

4. A foreman of defendants, who first hired plaintiff and other men, having testified that he was not authorized to hire them for defendants, it was perhaps error to permit plaintiff and another witness to testify that when the foreman employed them he said they were to work for defendants; but in view of the whole situation as shown by the other evidence it is *held* that such error was not material or sufficient to work a reversal. *Ibid.*

Same: State and federal statutes: Railway employees: Interstate commerce.

5. The rights of a person injured while repairing cars used solely in interstate commerce are to be determined in accordance with the federal laws, not the laws of the state in which the action is brought or the state in which the accident occurred. *Smiegil v. Great Northern R. Co.* 57

6. Under the federal laws, assumption of risk is still a defense to an action for such injuries; and under the evidence in this case the determination of the trial court that plaintiff assumed the risks incident to the employment is *held* not so clearly wrong as to justify this court in disturbing it. *Ibid.*

7. In order that an action for the death of a railway employee shall come within the federal statute it must appear that at the time of the accident both the carrier and the employee were actually engaged in interstate commerce. *Jacoby v. Chicago, M. & St. P. R. Co.* 610

[8. Whether a car clerk in the receiving department of a railway company while employed in the yards in and around the car shops in checking over and keeping account of the cars loaded with company material, many of which cars were received from, and others consigned to, points outside the state, is engaged in interstate commerce, is not determined.] *Ibid.*

9. Where such clerk, after having completed all his duties and having left the last place where any of his duties were to be performed, was struck and killed by an engine as he was leaving the railway premises without any immediate intention of returning, he was not, just at the time of the accident, engaged in interstate commerce. *Ibid.*

10. A mere manufacture or preparation of material which is destined at some time in the future to be used in interstate commerce is not interstate commerce work. So *held* as to the peeling of

railroad ties when done as a part of their manufacture independent of, and separate from, any immediate use of them in track repair, although the work was done by an employee, and upon the right of way, of a railway company engaged in interstate commerce. *Karras v. Chicago & N. W. R. Co.* 578

11. An action against the railway company for a personal injury sustained by the employee while engaged in said work was governed by the state, and not by the federal, statute, and he did not assume the risk arising from a failure of the employer to furnish reasonably safe appliances for the work. *Ibid.*

12. Under the federal statutes a railway employee engaged in interstate commerce may recover for personal injuries caused by the negligence of a fellow-servant, and does not assume the risk thereof. Whether or not the fellow-servant was theretofore incompetent and known by the employer to be so, is immaterial. *Hovaneck v. Great Northern R. Co.* 511

Same: Statutes of other states: Tools and appliances.

13. The doctrine in Michigan as to the duty of the master with respect to the tools and appliances furnished for the use of his servants seems to be the same as in Wisconsin; and in an action for injuries sustained by a servant engaged in decking or piling logs it was a question for the jury, upon the evidence, whether such duty had been breached by defendants. *Sempier v. Goemann,* 103

14. A finding by the jury that the proximate cause of the injury was negligence of defendants in failing to provide reasonably safe appliances in the so-called pup hooks which were used in raising the logs, is *held* to be sustained by the evidence. *Ibid.*

Same: Simple tools.

15. An injury to an employee engaged in peeling railroad ties was caused by a chip striking plaintiff's eye as he was chopping a knot on a tie with a dulled and short-handled hatchet which had been furnished to him for doing the work, and which he had been using for about two hours. *Held,* that such hatchet was a simple tool, that plaintiff, who was a man of mature years, must be deemed to have comprehended the ordinary and usual results of its use, that no duty devolved upon defendant to inspect it or instruct plaintiff in its use, and that the trial court should have set aside a finding by the jury that the hatchet was not a reasonably safe appliance for the purpose for which it was used. *Karras v. Chicago & N. W. R. Co.* 578

16. A complaint alleging that, while plaintiff was holding against a rivet head a chisel which a fellow-servant was striking with a sledge, a glancing blow struck the chisel from his hand and hurled it against his head, and that defendant was negligent in furnishing and allowing the use of the sledge, which was defective and out of repair in that its head was battered and chipped and its handle bent and crooked, but not showing that plaintiff had been engaged in such work for any appreciable time before the injury or that he had had any opportunity to examine the sledge or know of its condition, is *held* to state a cause of action. Under the circumstances stated the sledge cannot be said to have been a simple tool. *Hovaneck v. Great Northern R. Co.* 511

Same: Safety of working place: Assumption of risk.

17. Where the safe-place statute (secs. 2394—48, 2394—49, Stats.) is applicable, employees do not assume the risks arising from their employer's failure to comply therewith. *Kielar v. Fred Miller Brewing Co.* 237

Warning and instructing servant. See MASTER AND SERVANT, 15, 16.

Fellow-servants. See MASTER AND SERVANT, 3, 12.

Assumption of risks. See MASTER AND SERVANT, 6, 11, 12, 15–17. RAILROADS, 8.

Injury to railway employee: Lack of fence. See RAILROADS, 7–13.

Death of railway employee: Damages. See DAMAGES, 2, 3.

Liability for injuries to third persons through negligence of servants. See HOSPITALS.

MATERIALMEN. See MECHANICS' LIENS.

MAXIMS.
Res judicata pro veritate accipitur, 8.
Respondeat superior, 166, 170, 171.
Stare decisis, 449.

MEASURE OF DAMAGES. See CONTRACTS, 7. DAMAGES, 2, 3. EXCHANGE OF PROPERTY. VENDOR AND PURCHASER, 11.

MECHANICS' LIENS.

For what materials lien is given.

1. Coal furnished to the principal contractor and used in generating steam for engines which operated machinery in making a railroad right of way was not material used "for or in or about" the construction of such right of way, and no lien therefor is given by the statute (secs. 3314, 3315, Stats.). *Carnegie Fuel Co. v. Interstate T. R. Co.* 46

2. Where material has been consumed in the construction of a building or other structure,—it having had physical contact or immediate connection with the structure itself,—there may be a lien therefor: but if the material be used only to facilitate or make possible the operation of tools or machinery which in their turn act upon the structure, there can be no lien. *Ibid.*

Leased premises: When interest of owner exempt.

3. A written instrument is *held* in this case to be a lease creating the conventional relation of landlord and tenant, within the meaning of the provision in sec. 3314, Stats., which, except as therein specified, exempts the interests of the owner of leased land from a mechanic's lien for labor or material furnished at the request of the lessee. *Rohn v. Cook,* 299

4. That part of sec. 3314, Stats., providing that a lien "shall attach to and be a lien upon the real property of any person upon whose premises such improvements are made, such owner having knowledge thereof and consenting thereto," is not applicable where a lien is expressly forbidden by the terms of said sec. 3314. *Ibid.*

Notice of claim: Pleading.

5. In an action to enforce a mechanic's lien an allegation in a cross-complaint that "a notice that these defendants had performed work, labor, and services and furnished materials and

supplies in the repairs, construction, alteration, and improvements of said building as principal contractors, was served on" the owners of the land "in accordance with sec. 3315 of the" Statutes, is *held*, on demurrer, a sufficient allegation that a notice in compliance with sec. 3315, Stats., was served. *Rohn v. Cook*, 299

Action to foreclose; Parties: Limitation: Pleading.

6. The commencement of an action by any lien claimant to foreclose a mechanic's lien within the time limited by sec. 3318, Stats., is sufficient to authorize the court to consider and adjudicate in that action the rights of all lien claimants who are made parties, even though certain of such claimants were not made parties until after the expiration of one year from the date of their last charges for labor or materials furnished. *Rohn v. Cook*, 299

7. It being unnecessary for such a claimant to file a cross-complaint demanding affirmative relief, it is immaterial that such a cross-complaint fails to show that it was filed and the action commenced in favor of the cross-complainant within one year from the date of the last charge for labor or material furnished. *Ibid.*

MEETINGS of council, etc. See MUNICIPAL CORPORATIONS, 3–6.

MENTAL ANGUISH. See TELEGRAPHS.

MENTAL CAPACITY. See WILLS, 1.

MILLS AND MILLDAMS. See WATER POWERS.

MILWAUKEE CIVIL COURT. See APPEAL, 10.

MINORS. See INFANTS.

MINUTES of meeting of village board: Correction. See MUNICIPAL CORPORATIONS, 5, 6.

MISNOMER. See LIMITATION OF ACTIONS, 4. REFORMATION OF INSTRUMENTS.

MISTAKE. See CANCELLATION OF INSTRUMENTS. JUDGMENT, 7–9. MUNICIPAL CORPORATIONS, 5, 6. REFORMATION OF INSTRUMENTS. TAXATION, 13. WILLS, 2.

MORTGAGES. See CHATTEL MORTGAGES. DEEDS, 5. EXECUTORS, 1–3. HUSBAND AND WIFE, 2.

MOTIONS.

See APPEAL, 4. DISCOVERY.

An order to show cause is equivalent to a notice of motion, and the court proceeds thereon as upon a motion. *Gimbel v. Wehr*, 1

MOTOR VEHICLES. See AUTOMOBILES.

MUNICIPAL CORPORATIONS.

General charter law: Adoption in part.

1. Although a city ordinance adopting certain provisions of the general charter law was not passed by a three-fourths vote of all the councilmen, as required by sec. 926, Stats., yet, the city and its officers having thereafter acted in good faith under said provisions, and no action calling in question the validity of the ordinance having been brought within the three months limited by sec. 926*a*, the defect in procedure was cured. *Smelker v. Campbell*, 358

2. Subch. V, ch. 40a, Stats. (secs. 925—22 to 925—36), covering many different though nearly related subjects, is not to be considered as a complete scheme which must be adopted by a city in its entirety. Thus, an ordinance adopting all of the subchapter except secs. 925—25 and 925—28, relating to the methods of electing city officers and the time of the commencement of their terms, was not invalid because of such exception—those matters being fully provided for in the special charter of the city in a way not inconsistent with the sections adopted. *Ibid.*

Granting of licenses. See INTOXICATING LIQUORS. MUNICIPAL CORPORATIONS, 6.

Meetings of common council: Adjournments: Letting of contracts.

3. At a regular meeting of a city council on February 3d, bids from the P. Co. and the O. Co. for street lighting were received and referred to a committee, and the letting of the contract was laid over until the regular meeting of the council in May. The meeting was adjourned "subject to the call of the mayor." Thereafter the mayor issued a call stating that the council would "meet in February adjourned meeting . . . February 25, . . . for the purpose of finishing business, etc." At that meeting the action of the council putting over the letting of the lighting contract was rescinded, and the contract was awarded to the P. Co. at a price lower than either of the bids submitted on February 3d. *Held*, that the meeting of February 25th was a legal meeting and that the proper steps were taken by the council to award the contract. *Oconto E. Co. v. Peoples L. & M. Co.* 467

4. It appearing, however, that the mayor was the attorney of the P. Co. and that the meeting of February 25th was held to prevent the letting of the contract at the May meeting by the new council to be elected in April, to prevent the acceptance of the bid of the O. Co., and to make with the P. Co. a contract (which that company had prepared before the meeting) at a rate much lower than its previous bid and slightly lower than the bid of the O. Co.; and the P. Co. having, a few days later and before furnishing a bond to secure performance of such contract, applied to the railroad commission to increase the rate for street lighting for its benefit, it is *held* that the whole transaction shows a scheme of the P. Co. to secure the lighting contract at a price higher than that specified therein and higher than the price bid by the O. Co., and that therefore the contract so made was void in its inception and not binding on the city, which was free in May of that year to make a contract (as it did) with the O. Co. *Ibid.*

Same: Majority vote. See INTOXICATING LIQUORS, 7.

Meetings of village board: Record of proceedings: Correction.

5. Unless private rights have attached, a village board may order the record of its own proceedings, even after it has once been approved, to be corrected according to the facts; but if third persons have acted in reliance thereon and private rights have accrued thereunder, the record cannot be amended. *State ex rel. Owen v. Schotten,* 88

6. Where only two liquor licenses could be granted in a village, but the board in form granted three and the minutes showing that they were granted in a certain order were afterwards approved, such minutes, even if incorrect, could not thereafter be amended

to show the granting of the licenses in a different order, where the effect of the change would be to render invalid a license already issued to the second licensee named in such minutes and thereby subject him to loss of the fee paid and also to penalties for selling liquor unlawfully. *Ibid.*

Ordinances. See AUTOMOBILES. MUNICIPAL CORPORATIONS, 1, 2, 9. STREET RAILWAYS, 1–5.

Officers. See MUNICIPAL CORPORATIONS, 1, 2. OFFICERS, 1, 2, 7.

Contracts: Street lighting. See MUNICIPAL CORPORATIONS, 3, 4. PUBLIC UTILITIES.

7. The lighting of streets by electricity is not "work" within the meaning of a provision in a city charter that "all work for the city . . . including all printing . . . shall be let by contract to the lowest responsible bidder." *Oconto Electric Co. v. Peoples L. & M. Co.* 467

Bridges. See BRIDGES. NAVIGABLE WATERS.

Streets: Dedication: Plats. See DEDICATION.

Same: Requiring street railway company to repair. See STREET RAILWAYS, 1–5.

Same: Change of grade: Viaducts: Damage to abutting owners.

8. Where a change of the grade of a street is made by authority of law and with due care the municipality making the change is not liable for consequential injury to abutting lots, unless expressly made so by statute or the constitution. *Henry v. La Crosse,* 625

9. The grade of a street was established by city ordinance in 1883, and a viaduct was constructed over railway tracks in the street, but not at the exact grade then established. In 1913 the old viaduct was torn down and a new one was constructed, pursuant to an order of the railroad commission, at the grade established by the ordinance of 1883, which had never been changed and was at this time reaffirmed by ordinance. *Held,* that the new viaduct was built on a "permanently established grade," within the meaning of sec. 925—172, Stats. (which section the city had in the meantime adopted), and hence that there was no liability to abutting property owners although it was not built on the same grade as the old viaduct. *Ibid.*

10. A provision in the order of the commission to the effect that the city in which the viaduct was to be built should "assume responsibility for any alleged damage to adjacent property or business caused by the issuance or enforcement of this order, or by the proper prosecution of the work," did not create or attempt to create any liability to abutting owners for change of grade, other than that provided by law. *Ibid.*

11. Extension of the tracks of a street railway company over such viaduct and operation of its cars thereon do not constitute an additional burden entitling abutting property owners to damages. *Ibid.*

Same: Rights of abutting owners. See MUNICIPAL CORPORATIONS, 8–11, 14. RAILROADS, 2–6.

Nuisances: Drainage: Sewers.

12. In an action to abate a nuisance and for damages, findings by the trial court to the effect that the pollution or defilement of plaintiff's springs and ponds, used by it in conducting a fish

hatchery, was not in any manner caused by acts of the defendant village, are *held* to be sustained by the evidence, from which it appeared, among other things, that such springs and ponds are in the course of the natural surface drainage of a large area including a considerable part of the village, that private drains had been constructed by plaintiff, its predecessor in title, and other property owners on the streets, that the village had not built or authorized any such drains or any sewers, and that street improvements affecting the flow of surface water had been made solely in the discharge of the duty of the village to care for its streets. *Crystal Spring B. T. H. Co. v. Lomira,* 515

13. Although the village had power to lay out a general sewerage system it was not liable in this case for failure to do so. *Ibid.*

14. Abutting owners have certain rights in the streets of a municipality not inconsistent with the servitude to which the street is subject, and the municipality is not liable for the exercise of those rights by such owners. *Ibid.*

Injuries from defects in streets: Liability.

15. In an action against a city for injuries to a pedestrian who fell when he stepped or his foot slipped into a break or hole in the curbstone at a point about three and one-half feet distant from the sidewalk and crosswalk prepared for travel, it is *held* that the trial court was not clearly wrong in directing a verdict for defendant on the ground that, in view of its location, the defect in the street was not an actionable one. *Kuchler v. Milwaukee,* 320

MUNICIPAL COURTS. See CRIMINAL LAW, 1.

MUTUAL BENEFIT SOCIETIES. See INSURANCE, 4–13.

NAVIGABLE WATERS.

See WATER POWERS.

1. The riparian owner on a stream which is not a state boundary line takes to the center of the stream, subject to the rights of the public to use the stream, and the boundaries of the riparian lot are to be produced to the center of the stream at right angles with the center line. *Metropolitan Inv. Co. v. Milwaukee,* 216

2. The boundaries of the public easement over the stream opposite a street end are determined in the same manner; and a bridge extending beyond such boundaries and encroaching upon the submerged land of an adjacent riparian owner cannot be built by a city without first condemning the land. *Ibid.*

NEGLIGENCE.

See AUTOMOBILES. CANCELLATION OF INSTRUMENTS, 1. CARRIERS. ELECTRICITY. HOSPITALS. MASTER AND SERVANT, 5–12. PHYSICIANS AND SURGEONS. RAILROADS, 7–16. STREET RAILWAYS, 6. TELEGRAPHS.

Defective construction of step-ladder: Manufacturer's liability.

1. To render the manufacturer liable for injuries alleged to have been caused by defective construction of a standard article (in this case a step-ladder) intended for a certain use, it must be shown that it left his hands in a faulty condition. *Galst v. American Ladder Co.* 307

2. Evidence that, after an accident caused by the spreading of the legs of a step-ladder, a staple which held a heavy cord intended to prevent such spreading was found to be loose, was insufficient to prove that the staple was loose when the ladder left the hands of the manufacturer six months before, there being testimony that such ladders were repeatedly inspected during the process of manufacture and were again carefully inspected before shipment; that the ladder in question had been handled at least five times after shipment before being used; and that no inspection of it had been made by the retail dealer, by the purchaser, or by the workman who had used it, prior to the accident. *Ibid.*

Unguarded machinery: Injury to child playing near: Anticipation of injury.

3. A complaint alleging that, with the knowledge and consent of defendant, children of tender age living near his sawmill were in the habit of playing underneath said mill in close proximity to an unguarded revolving shaft which, because of the rapidity of its revolution and the darkness of the place, was inherently dangerous to such children, and that solely because of defendant's negligence in failing to guard said shaft and take other necessary precautions the plaintiff (one of said children) was caught by the shaft and severely injured, is *held* to state a cause of action for ordinary negligence, the defendant being bound, under the circumstances stated, to anticipate that an injury might result to some child. *Herrem v. Konz,* 574

4. Allegations of the above facts, in a so-called second cause of action, together with an averment that plaintiff was injured solely because of defendant's *gross* negligence in failing to guard said shaft and his utter disregard of the safety of the children, do not state a cause of action for gross negligence. *Ibid.*

Gross negligence: Pleading: Joinder of causes of action. See NEGLIGENCE, 4.

5. If the facts alleged in a pleading do not show an intent, either actual or constructive, to cause injury, or conduct evincing a total disregard for the safety of persons or property, they do not constitute gross negligence, even though the pleading characterizes them as such. *Herrem v. Konz,* 574

6. A cause of action based upon the same facts may be pleaded in the same complaint, first as creating a liability for ordinary negligence, and second as creating a liability for gross negligence, depending upon the inferences to be drawn from the facts. *Lueke v. Senn,* 544

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEW TRIAL. See APPEAL, 4, 10. JUDGMENT, 3. RAILROADS, 13.

NOMINAL DAMAGES. See APPEAL, 8. LIBEL, 4. OFFICERS, 4–6.

NOTICE.

Of acceptance of guaranty. See GUARANTY, 2.
Of accident. See INSURANCE, 4.
Of claim for lien. See MECHANICS' LIENS, 5.
Of disappearance and death of insured. See INSURANCE, 5, 6.
Of election as to Compensation Act. See WORKMEN'S COMPENSATION, 8–11.
Of injury to person. See LIMITATION OF ACTIONS, 2–4.

Of motion. See MOTIONS.
Of rescission of contract. See VENDOR AND PURCHASER, 8.
Of rights in land. See CANCELLATION OF INSTRUMENTS, 3, 4.
By tax-deed grantee to owner. See TAXATION, 16.

NUISANCE.

See INTOXICATING LIQUORS, 11. MUNICIPAL CORPORATIONS, 12–14. RAILROADS, 5.

If pigs are raised on a farm under conditions as clean and sanitary as can reasonably be attained, considering the characteristics of the animal and the necessity for confinement in close quarters, the fact that odors from those quarters are carried abroad on the summer breeze will not make an actionable nuisance. *Clark v. Wambold,* 70

OBLIGATION OF CONTRACT: Impairing. See STREET RAILWAYS, 3.

OCCUPATION TAXES. See TAXATION, 1–3.

OFFICERS.

Removal from office: Civil service laws.

1. Where the tax commissioner of the city of Milwaukee in good faith removes a subordinate for cause pursuant to sec. 4, ch. 313, Laws 1895, as amended by ch. 547, Laws 1911, even though he may have been mistaken as to the existence of the cause assigned, the remedy given by said section by way of making answer and being heard in the matter is exclusive, and reinstatement will not be compelled by *mandamus* or other judicial proceeding. *State ex rel. Langen v. Bodden,* 243
2. The discharge by such tax commissioner of a ward assessor on the ground that he had been convicted and fined by the district court for being drunk and disorderly is within the rule above stated, even though such conviction was afterwards set aside on appeal. *Ibid.*

Fees and compensation. See COUNTIES, 1, 6. MUNICIPAL CORPORATIONS, 2.

3. A public officer takes his office *cum onere* and is entitled to no salary or fees except what the statute provides. *Outagamie County v. Zuehlke,* 32

Failure to perform duty: Breach of official bond: Liability: Nominal damages.

4. In the absence of proof that actual damages were naturally and proximately caused by the failure of a public officer to perform an official duty, only nominal damages are recoverable where a liability exists. *State ex rel. Sheldon v. Dahl,* 272
5. Where, prior to the recording, as required by sec. 1789, Stats., of the resolution dissolving a trust company which had deposited securities with the state treasurer pursuant to sec. 1791*e*, Stats. (ch. 504, Laws 1905), said treasurer surrendered the securities to the trust company, such surrender, even though made in good faith, was a breach of his official bond and rendered him liable to the creditors of the trust company, if such premature delivery naturally and proximately caused them any actual damage. *Ibid.*
6. It appearing in such case, among other things, that the securities were surrendered in good faith one day before the resolution of

dissolution was recorded; that such surrender did not in fact prevent or prejudice the taking by the plaintiff creditors of any contemplated action to assert their rights to have the securities applied to the satisfaction of their demands, and that, even if the securities had not been prematurely surrendered, they would have been surrendered, in good faith and in the exercise of due care and diligence, before any active steps were in fact taken by plaintiffs to enforce their beneficial rights therein,—it is *held* that the treasurer's act, though a technical breach of his legal duty, did not cause any actual damage to plaintiffs, and hence that nominal damages only are recoverable. *Ibid.*

Fraud of city officers: Validity of contracts. See MUNICIPAL CORPORATIONS, 4.

Malfeasance by town officers: Sales to town: Recovery of money paid.

7. The sale to a town by its chairman of articles of merchandise needed and used by it was a violation of sec. 4549, Stats., even though it saved the town considerable inconvenience and was made in good faith and without solicitation on the part of the seller and none of the articles sold has been or can be returned. *Arbuthnot v. Kelley,* 362

8. A taxpayer's action for the recovery of the money paid on such a sale cannot be successfully defended against on the ground of laches, short of the statutory limitation. *Ibid.*

State treasurer. See OFFICERS, 4–6.

Register of deeds. See COUNTIES, 1–6.

Mayor of city. See INTOXICATING LIQUORS, 7. MUNICIPAL CORPORATIONS, 4.

Officers of banks. See BANKS AND BANKING. INDEMNITY.

Of benefit societies. See INSURANCE, 5, 6.

Of other corporations. See CORPORATIONS.

OFFICIAL BONDS: Breach: Liability. See OFFICERS, 4–6.

OMISSIONS of taxable property: Validity of levy. See TAXATION, 5.

OPENING DEFAULT. See PLEADING, 1, 2.

ORDER TO SHOW CAUSE. See MOTIONS.

ORDINANCES. See AUTOMOBILES. MUNICIPAL CORPORATIONS, 1, 2, 9. STREET RAILWAYS, 1–5.

PARENT AND CHILD. See BILLS AND NOTES, 1–3. CONTRACTS, 1. DEEDS, 3–5.

PAROL EVIDENCE affecting writings. See BILLS AND NOTES, 2. DIVORCE, 3. JUDGMENT, 14–16. VENDOR AND PURCHASER, 7.

PARTIES. See APPEAL, 5. HIGHWAYS, 1. MECHANICS' LIENS, 6. TAXATION, 9. WORKMEN'S COMPENSATION, 26, 27.

PASSENGERS. See AUTOMOBILES, 1–4. CARRIERS, 3.

PAYMENT.

By note given on Sunday. See SUNDAY.

Application of payments: Priority. See GUARANTY, 5.

When a debtor makes a payment without application the creditor cannot apply the amount of the payment to a debt not due, to the exclusion of one due or overdue. *International Harvester Co. v. Holmes,* 506

Payment "in money." See INSURANCE, 14.

Payment in gross sum. See WORKMEN'S COMPENSATION, 16.

PENALTIES. See WATER POWERS, 1, 3.

PERFORMANCE. See JUDGMENT, 14–16. VENDOR AND PURCHASER, 1, 4, 5, 9, 10.

PERPETUATION OF EVIDENCE. See DEPOSITIONS.

PERSONAL INJURIES. See AUTOMOBILES. CARRIERS, 3. DAMAGES, 2–6. HIGHWAYS. HOSPITALS. INSURANCE, 4. LIMITATION OF ACTIONS, 2–4. MASTER AND SERVANT, 3–17. MUNICIPAL CORPORATIONS, 15. NEGLIGENCE. PHYSICIANS AND SURGEONS. RAILROADS, 7–16. STREET RAILWAYS, 6. TRIAL, 1. WITNESSES.

PERSONAL PROPERTY. See BILLS AND NOTES. CARRIERS, 1, 2. CHATTEL MORTGAGES. COMMERCE, 1. HUSBAND AND WIFE, 2, 3. SALES. TROVER AND CONVERSION. TRUSTS AND TRUSTEES.

PHYSICIANS AND SURGEONS.

See EVIDENCE, 2. HOSPITALS, 1. LIMITATION OF ACTIONS, 3.

In an action against a physician for malpractice a complaint stating, as a first cause of action, facts sufficient to show ordinary negligence, and, as a second cause of action, stating the same facts and that defendant "wantonly and wilfully misrepresented to her [plaintiff] and falsified to her" in regard to his ability and her condition, is *held* to state but one cause of action, the facts alleged in the so-called second cause of action not being sufficient to show a liability for gross negligence. *Lueke v. Senn*, 544

"PIGS IS PIGS." See NUISANCE.

PLACE OF TRIAL. See VENUE.

PLATTING LANDS.

See DEDICATION.

1. Where a plat made by the owner of land and recorded, but not signed or acknowledged by any one, covered also an adjoining tract the owners of which never assented to or adopted it as a plat of their land, it did not constitute a grant or dedication of a strip marked thereon as a street in said adjoining tract. *Rau v. Freund*, 27
2. A plat not entitled to record may be referred to, in conveying the real estate it embraces, for the purposes of description and identification; but such a reference does not of itself make the plat operative as a statutory dedication of a strip indicated thereon as a street. *Ibid.*

PLEADING.

Complaint: Sufficiency. See ESTOPPEL. MASTER AND SERVANT, 16. NEGLIGENCE, 3–5. PHYSICIANS AND SURGEONS. RAILROADS, 4–6. SALES, 2. TOWNS, 2.

Same: Joinder of causes of action. See NEGLIGENCE, 6. PHYSICIANS AND SURGEONS.

Answer: Statute of limitations. See LIMITATION OF ACTIONS, 5, 6.

Counterclaim. See ATTORNEY AND CLIENT, 4, 6. JUDGMENT, 9.

Cross-complaint: Sufficiency. See MECHANICS' LIENS, 5, 7.

Demurrer. See LIMITATION OF ACTIONS, 5. MECHANICS' LIENS, 5, 7. RAILROADS, 6.

Opening default: Discretion.

1. An order opening a default, setting aside a verdict, and permitting an answer to be filed is *held* in this case not to have been an abuse of discretion. *Sempier v. Goemann,* 103

Filing of reply at trial.

2. The filing of a reply to a counterclaim was properly permitted at the trial in this case. *Guild v. Deniston,* 123

Amendment. See RAILROADS, 6. TAXATION, 9.

3. Under secs. 2830, 2836*b*, Stats., the trial court should permit an amendment of the complaint to conform to the proofs, even though leave to amend is not asked until after the court has announced its decision granting a nonsuit. A variance between the proofs and the allegations of the complaint should be disregarded, and no litigant should be sent out of court where the facts established by the evidence show that he has a just claim. *Micek v. Wamka,* 97

POLICE POWER. See STREET RAILWAYS, 3.

POPULATION of city: How ascertained. See INTOXICATING LIQUORS, 6.

POSSESSION.

Of land. See BRIDGES. CANCELLATION OF INSTRUMENTS, 4. INSURANCE, 2, 3. TAXATION, 15.

Of personal property. See HUSBAND AND WIFE, 2, 3. SALES, 3–5.

PRACTICE: Simplification: Mistakes, omissions, amendments, etc. See APPEAL, 2. COURTS, 4, 5. PLEADING, 3. RAILROADS, 6.

PRECATORY WORDS. See WILLS, 11, 12.

PRESCRIPTION. See BRIDGES. EASEMENTS.

PRESUMPTIONS. See CONTRACTS, 1. DEATH, 1. INTOXICATING LIQUORS, 9. JUDGMENT, 10. WILLS, 3.

PRINCIPAL AND AGENT. See BROKERS. CONTRACTS, 2. HOSPITALS. VENDOR AND PURCHASER, 2.

PRINCIPAL AND SURETY. See INDEMNITY.

PRINTED CASE on appeal. See COSTS, 4, 5.

PRIOR CONVICTIONS. See CRIMINAL LAW, 3, 4.

PRIVILEGE. See LIBEL AND SLANDER, 1.

PROMISSORY NOTES. See BILLS AND NOTES.

PROOF OF DEATH. See INSURANCE, 5, 6.

PROXIMATE CAUSE. See WORKMEN'S COMPENSATION, 6, 7, 15.

PUBLIC EASEMENT. See NAVIGABLE WATERS, 2.

PUBLIC NUISANCE. See INTOXICATING LIQUORS, 11.

PUBLIC POLICY. See ATTORNEY AND CLIENT, 1, 2. BANKS AND BANKING, 2. MARRIAGE, 2–6.

PUBLIC SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS.

PUBLIC UTILITIES.

What are "public utilities:" Franchises not legally operative: Annulment: Indeterminate permits.

1. Where, pursuant to a city ordinance purporting to grant a franchise to do commercial and municipal lighting, a corporation was doing a commercial lighting business in 1907, when the Public Utility Law (secs. 1797*m*—1 to 1797*m*—108, Stats.) took

effect, it was a "public utility" and that law conferred upon it the power to do such business, although its articles of incorporation did not expressly authorize it to do so; and having continued to do such lighting it acquired an indeterminate permit therefor by virtue of ch. 596, Laws 1911 (sec. 1797*m*—77, Stats.). *Oconto Electric Co. v. Peoples L. & M. Co.* 467

2. The word "granted" in ch. 596, Laws 1911, was not used in a technical or limited sense, but covered grants legally inoperative for want of corporate power of the grantee; and where, pursuant to the ordinance above mentioned, the grantee of said franchise began to do municipal lighting in 1909, two years after the Utility Law took effect, its franchise to do such lighting became an indeterminate permit under said act of 1911. *Ibid.*

3. Even if the mayor had a pecuniary interest in a franchise granted by a city to a lighting company, the courts may properly refuse to annul such franchise in a *quo warranto* action prosecuted, not in the public right—two successive attorneys general having declined to move in the matter—or to protect the public interest, but for the personal advantage of a private relator and in the interest of a competitor seeking to acquire the business of the grantee of the franchise, especially where the facts were known to the relator and said competitor for seven years before the action was begun, during which time they lay by and permitted said grantee to build up its plant and business. *Ibid.*

4. By the acts of the city, covering a number of years before and after the Public Utility Act took effect, in dealing with and making contracts for municipal lighting with the grantee of the franchise last above mentioned, said grantee acquired rights in the nature of a "license, permit or franchise," which in 1909 were exchangeable for an indeterminate permit under the Utility Law, although at that time said grantee was doing only commercial lighting, the contract for municipal lighting having been awarded to another company. *Ibid.*

Suspension of exercise of rights: Abandonment of franchise.

5. The suspension contemplated by sec. 1797*m*—74*n*, Stats. (Laws 1913, ch. 621),—providing that no public utility engaged in furnishing heat, light, etc., shall, without first obtaining a certificate of convenience and necessity, exercise any right under any franchise the exercise of which "has been suspended for more than one year,"—is a voluntary suspension of more than one year after the passage of the act. It does not cover a suspension for a year of the exercise of a franchise to do street lighting, due to the fact that the contract for such lighting was awarded to a competing company,—such a suspension being excusable, temporary, and involving no purpose to abandon. *Oconto Electric Co. v. Peoples L. & M. Co.* 467

[6. Whether the right to do street lighting and that to do private lighting should be considered as separate and distinct franchises, so that, under said sec. 1797*m*—74*n*, after the suspension of either, a certificate of convenience and necessity must be obtained before that kind of lighting could be resumed, is not determined.] *Ibid.*

7. Abandonment means an intentional, voluntary surrender. *Ibid.*

8. Although a lighting company which had been doing the street lighting in a city did not submit a bid for such lighting at the expiration of its contract and, when such lighting was awarded for five years to a competing company, sold to the latter such of its equipment for street lighting as it could not use in its commercial business, this did not constitute an abandonment of its right or franchise to do street lighting, where the reason for its not submitting such bid was that it understood that it was precluded therefrom by the fact that the competing company had secured the exclusive privilege of using in that city the only lamp which would meet the requirements of the proposed contract. *Ibid.*

Street lighting: Contracts. See MUNICIPAL CORPORATIONS, 3, 4, 7.

9. Every contract for street lighting is subject to having the rate thereof raised or lowered by the railroad commission, under the Public Utility Law. *Oconto E. Co. v. Peoples L. & M. Co.* 467

10. When a valid contract for street lighting made by a city with a public utility therein is duly filed with the railroad commission the rate agreed upon therein becomes presumptively reasonable and enforceable until a different rate is established in place thereof by the commission pursuant to law. *Ibid.*

PUNITORY DAMAGES. See LIBEL AND SLANDER, 4.

QUESTIONS FOR JURY. See TRIAL.

QUIETING TITLE. See CANCELLATION OF INSTRUMENTS. DEPOSITIONS, 2–4. JUDGMENT, 8, 9.

QUITCLAIM DEED. See CANCELLATION OF INSTRUMENTS.

QUO WARRANTO. See PUBLIC UTILITIES, 3.

RAILROAD COMMISSION. See PUBLIC UTILITIES, 9, 10. RAILROADS, 1. STREET RAILWAYS, 4. WATER POWERS.

RAILROADS.

As carriers. See CARRIERS, 1, 2.

Right of way: Inclusion in quitclaim deed: Mistake. See CANCELLATION OF INSTRUMENTS.

Construction: Viaducts. See MUNICIPAL CORPORATIONS, 9, 10.

1. The state railroad commission has power to order the construction of a viaduct by a railway company over its tracks, and such company has the right to construct it in compliance with such order. *Henry v. La Crosse,* 625

Same: Occupancy of street: Damage to abutting property: Consent: Condemnation of land.

2. The construction of a railroad in front of plaintiff's land but on the farther half of the street and not taking any of his property—which, it is *held,* is the situation shown by the complaint in this case—was authorized by sub. (5), sec. 1828, Stats., and was not a trespass upon plaintiff's land, but entitled him, under sec. 1296*a*, to compensation for any consequential damages suffered through impairment of his rights appurtenant to the property. *Peters v. Chicago & N. W. R. Co.* 529

3. Consent by a landowner to such occupancy of the street by a railroad company, subject to his right to compensation, is a waiver

of the right to sue for damages and to restrain the continuance of such occupancy, and his only remedy is by condemnation proceedings under sec. 1852, Stats. *Ibid.*

4. A complaint alleging that plaintiff desisted from protesting against construction of the track upon being assured that he would be compensated for the taking of the street and any damage sustained by him, did not set forth a cause of action on express contract where the purpose of the action clearly was to recover damages and, in effect, to compel a removal of the track. *Ibid.*

5. Plaintiff in such case, having made no further protest until after the track was completed and trains were running thereon, in effect consented to the occupancy of the street and, by force of the statute, there arose an implied contract on the part of the railroad company to pay to him his legal damages, to be determined in condemnation proceedings; and there is no foundation for an action as for trespass or to abate a nuisance. *Ibid.*

6. A demurrer to the complaint in such case was properly sustained; but under sec. 2836*b*, Stats. 1913, the action need not be dismissed but may, by amendment, be turned into a proceeding for condemnation. *Ibid.*

Same: Material used in making right of way: Lien. See MECHANICS' LIENS, 1.

Fences: Duty to maintain: Injury to employee: Switchtracks, when part of "road."

7. Sec. 1810, Stats.,—which makes a railway company absolutely liable for all damages occasioned by its failure to fence its road as therein required,—is for the benefit of railway employees as well as for the general public, and is applicable in the case of an employee who was killed while leaving the railway premises. *Jacoby v. Chicago, M. & St. P. R. Co.* 610

8. An employee of a railway company continuing in such employment with a knowledge of the fact that the road is unfenced does not thereby assume the risk or waive his right, under sec. 1810, Stats., to recover for injuries occasioned by the want of such fence. *Ibid.*

9. Under said sec. 1810 the duty of a railway company to fence both sides of any portion of its road except depot grounds and places where, as provided in sub. 4, the proximity of ponds, lakes, watercourses, ditches, embankments, etc., renders a fence unnecessary, is absolute; and this court has not recognized the rule (adopted in certain jurisdictions) under which other exceptions may be read into the statute. *Ibid.*

10. One of defendant's civil engineers having upon the trial identified as accurate and complete a blue-print map of the premises at and surrounding the place of the accident which disclosed no fence south of defendant's sidetracks, and neither such engineer nor any other witness having testified as to the existence of any fence opposite the place of the accident, it is *held* that there was no showing in the record of an attempted compliance by the defendant with sec. 1810. *Ibid.*

11. Ten feet south of defendant's east-bound main track is a sidetrack about a mile and a half long, known as switchtrack No. 1, connecting at each end with said east-bound track. South of this track No. 1 and connected with it at the east end are nine or

more parallel switchtracks of varying length, used largely in connection with defendant's car shops. Plaintiff's intestate was struck and killed by a switch engine on the east-bound main track, just after he had crossed switchtrack No. 1 by climbing over the bumpers between stock cars which were standing on that track. *Held*, that to sustain a judgment for plaintiff on the ground that defendant had failed to comply with sec. 1810, Stats., it must appear that the statute required a fence between the east-bound main track and switchtrack No. 1, since the absence of a fence anywhere else could not be said to have occasioned in whole or in part the death of the intestate. *Ibid.*

12. It appearing, by the uncontradicted evidence, that said switchtrack No. 1 was used as a track on which cars, after being repaired in the shops, were placed in order that they might be taken off by a switch engine and put into the regular transportation business of the defendant, said track cannot be considered merely as a part of an industrial plant (the car-shop system) but must be held a part of defendant's "road," as that word is used in sec. 1810, Stats.; and hence no fence was required by law between said track No. 1 and the east-bound main track. *Ibid.*

13. It being conceded by both parties that upon a second trial there could be no change in the testimony as to the use of said track No. 1, a final judgment dismissing the complaint is directed. *Ibid.*

Same: "Depot grounds."

14. Ordinarily the question whether the *locus in quo* of an accident is depot grounds which need not be fenced is one for the jury; but the evidence as to the location and use of the part of the road where the injury occurred or where it is claimed the fence should be may be so clear and free from conflict that it can be said as a matter of law that the place is or is not depot grounds. *Prince v. Chicago & N. W. R. Co.* 212

15. The place where passengers get off and on trains, and where goods are loaded and unloaded, and all grounds necessary, convenient, and actually used for such purposes by the public and by the railway company, including the place where cars are switched and trains made up; also the place where tracks are used for storing cars, and where the public require open and free access to the railroad for the purposes of such business, constitute depot grounds. *Ibid.*

Injuries to persons on or near track: Contributory negligence.

16. Plaintiff, an adult familiar with the frequent passage of trains in that locality, was struck and injured by an engine in defendant's depot grounds. He testified that at a street crossing he had looked south and saw no train, though he says one might have been there about 100 feet away. The view to the south was unobstructed for a mile or more. He then turned north and walked about ninety feet along a path five or six feet from the track and when he came to some water or a muddy place he stepped toward the track and was instantly struck by the engine. He had not looked for a train from the time he left the street. *Held*, that he was guilty of contributory negligence as a matter of law. *Prince v. Chicago & N. W. R. Co.* 212

Injuries to employees. See DAMAGES, 2, 3. MASTER AND SERVANT, 5–12. RAILROADS, 7–13. WORKMEN'S COMPENSATION, 13, 14.

RATIFICATION. See CONTRACTS, 2.

REAL-ESTATE BROKERS. See BROKERS.

REAL PROPERTY. See BRIDGES. BROKERS. CANCELLATION OF INSTRUMENTS. CONTRACTS, 1. COUNTIES, 1–6. DEDICATION. DEEDS. DEPOSITIONS, 2–4. EASEMENTS. EXCHANGE OF PROPERTY. INSURANCE, 2, 3. JUDGMENT, 8, 9, 14–16. MECHANICS' LIENS. MUNICIPAL CORPORATIONS, 8–14. NAVIGABLE WATERS. PLATTING LANDS. RAILROADS, 2–6. TAXATION, 11–16. VENDOR AND PURCHASER. WATER POWERS. WILLS, 2, 8–17.

REASSESSMENT of taxes. See TAXATION, 7, 8, 13.

RECEIPT in full: Fraud. See MASTER AND SERVANT, 2.

RECEIVERS.

See LIMITATION OF ACTIONS, 4.

1. The discretion of a receiver in the administration of his trust is so limited that he cannot tie up the trust estate or prevent the court from enforcing an administration thereof in such manner as to protect the best interests of the trust; and all parties dealing with him are charged with knowledge of these limitations on his power and deal with him at their peril. *Delbridge v. Kaukauna Fibre Co.* 435
2. Contracts extending beyond the receivership and intended to be binding upon the trust, if made without express authority from or approval by the court, are within the equitable control of the court and subject to modification or cancellation if the court finds it necessary for the protection of the trust. *Ibid.*
3. Where a receiver, who was authorized by the order appointing him to manufacture pulp in a pulp mill and to sell and dispose of the same in the regular course of business until the further order of the court, made a contract to sell and deliver the product of the mill at a certain price up to a date about eleven months thereafter, such contract, though deemed fair and reasonable at its inception, was terminable and was properly canceled by the court at the termination of the receivership, and the other party has no claim for damages on account of such cancellation. *Ibid.*
4. An order, in such case, permitting the purchaser to pay at the contract price for the product already delivered, but directing the receiver, in case of default in such payment, to sue for the market price, was erroneous and is modified so as to direct suit, in case of default, for the contract price. *Ibid.*

RECORDING deposition. See DEPOSITIONS, 5, 7.

RECORDING ACTS. See CANCELLATION OF INSTRUMENTS, 3.

REFORMATION OF INSTRUMENTS.

1. A court of equity has power to reform a contract so as to correct a misnomer of a party, and in so doing it does not make a new contract or substitute one party for another. *Komula v. General Accident, F. & L. A. Corp.* 520
2. An application for workmen's compensation insurance was made on behalf of plaintiffs, a firm doing business as the J. K. Co., but through a mistake the policy was issued by defendant to "J. K., an individual." It was delivered in December, 1913, to

one of the partners, who put it in a safe without reading it. The partners were all Finlanders, unfamiliar with business of that nature and, except one, unable to read or write English. J. K. as an individual had no employees and had no benefit of the policy. In February, 1914, an employee of the firm was injured, and in December, 1915, after proceedings of which defendant had notice, an award made by the industrial commission and confirmed by the circuit court was paid by the firm to said employee. In March, 1916, this action was brought to reform the policy and recover the amount of such award. *Held*, that the failure to discover the error in the policy was excusable and that plaintiffs were not estopped. *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, distinguished. *Ibid.*

REFUNDING amount paid at tax sale. See TAXATION, 13, 14.

REGISTERS OF DEEDS: Abstracts of title: Fees. See COUNTIES, 1–6.

REMEDIES. See COURTS, 2, 3. DEEDS, 3–5. JUDGMENT, 1, 2. OFFICERS, 1, 2. RAILROADS, 2–6. VENDOR AND PURCHASER, 6, 9–11.

REMOVAL FROM OFFICE. See OFFICERS, 1, 2.

REPEAL of special statutes. See COUNTIES, 5.

REPLEVIN. See TRIAL, 2.

REPLY. See PLEADING, 2.

RESCISSION of contracts. See BROKERS, 2. CANCELLATION OF INSTRUMENTS, 1, 2. CONTRACTS, 4.

RES JUDICATA. See DEPOSITIONS, 4.

RESOLUTIONS of county board: Reference: Definiteness. See COUNTIES, 9, 10.

REVIEW, BILL OF. See JUDGMENT, 4.

RIGHT OF WAY. See CANCELLATION OF INSTRUMENTS, 1–4. EASEMENTS.

RIPARIAN RIGHTS. See BRIDGES. NAVIGABLE WATERS.

RIVERS. See NAVIGABLE WATERS. WATER POWERS.

ROADS AND STREETS. See AUTOMOBILES. BRIDGES. DEDICATION. ELECTRICITY. HIGHWAYS. MUNICIPAL CORPORATIONS, 8–15. NAVIGABLE WATERS, 2. PLATTING LANDS. RAILROADS, 2–6.

RULES.
For administration of law: Adherence to. See COURTS, 1.
Of county board: Reference of resolutions. See COUNTIES, 9.

SAFETY of appliances, working place, etc. See MASTER AND SERVANT, 11, 13–17.

SALARIES. See OFFICERS, 3.

SALES.

Validity of contract: Interstate commerce. See COMMERCE.

Same: Statute of frauds: Estoppel.

1. Where the parties to a written contract for the sale and delivery of goods made an oral agreement extending the time for delivery, and the seller relied thereon and but for such agreement would have made delivery within the time previously specified, the buyer is estopped from asserting that such oral modification of the written contract was invalid under the statute of frauds. *Hirsch R. M. Co. v. Milwaukee & F. R. V. R. Co.* 220

2. Such estoppel is *held* to have been sufficiently pleaded in this case, every material fact necessary thereto being alleged except the fact that the seller relied upon the oral agreement and but for it would have made delivery in accordance with the written contract, and that fact being, under all the circumstances, inferentially pleaded by an allegation to the effect that the buyer had waived performance. *Ibid.*

Acceptance of goods: Retention for unreasonable time.

3. One purchasing a machine has a reasonable time and no more in which to test it, and retention after such period is deemed an acceptance sufficient to bind him for the purchase price. *J. L. Owens Co. v. Whitcomb,* 92

4. In an action for the purchase price of a grain separator which was sold under a contract guaranteeing it to be satisfactory to defendant and was installed and used in his mill while he was in California, a finding of the trial court to the effect that plaintiff agreed that the approval or disapproval of the machine might await the return of the defendant is *held* to be without support in the evidence. *Ibid.*

5. The use of such separator from March 20th to May 1st, when it might have been tested in a few hours, constituted an acceptance under the above rule and under sec. 1684*t*—48, Stats. *Ibid.*

6. A claim by defendant of $15 for services of a millwright in installing and repairing the separator was improperly allowed by the trial court, it appearing that the millwright's bill included other work, so that there was no satisfactory basis for allowing more than $5 which plaintiff had previously allowed defendant for work done in installing the machine. *Ibid.*

Sale of liquor to keeper of saloon: Holder of license liable. See INTOXICATING LIQUORS, 10.

SALES FOR TAXES. See JUDGMENT, 8, 9. TAXATION, 11–16.

SALES OF LANDS. See BROKERS. EXCHANGE OF PROPERTY. VENDOR AND PURCHASER.

SCHOOLS AND SCHOOL DISTRICTS.

Issue of bonds: Deposit by purchaser: Recovery. See FRAUD, 1.

Building contracts: Changes in material, etc.: Restraining payments.

1. In a contract for the erection of a school building a clause providing that changes might be made by the school board in the materials, methods of construction, etc., of the building, was a usual and valid provision. *Pung v. Derse,* 342

2. Such changes, when they are made in good faith and do not substantially change the character of the building or unreasonably increase its cost, may be legally made without taking the steps required to be taken before letting the original contract. So *held* as to a change from a composition roofing of the tar and gravel type to an asbestos and asphalt built-up roofing. *Ibid.*

[3. Whether a taxpayer's action can be maintained to restrain the making of payments on a building contract because of changes made as above stated, where neither the taxpayer nor the municipality suffers any loss, and especially where the action was not commenced until the work was nearly finished, is doubted.] *Ibid.*

SELF-DEFENSE. See ASSAULT.

SERVICE of notices. See LIMITATION OF ACTIONS, 2-4. MECHANICS' LIENS, 5.

SETOFF AND COUNTERCLAIM. See ATTORNEY AND CLIENT, 4-6. JUDGMENT, 9.

SEWERS. See MUNICIPAL CORPORATIONS, 12-14.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 15.

SIGNATURE. See JUDGMENT, 10. VENDOR AND PURCHASER, 2.

SIMPLE TOOLS. See MASTER AND SERVANT, 15, 16.

SPECIAL APPEARANCE. See APPEARANCE.

SPECIAL VERDICT. See TRIAL.

SPECIFIC PERFORMANCE. See VENDOR AND PURCHASER, 1, 4, 5, 9, 10.

STATE AND FEDERAL STATUTES. See MASTER AND SERVANT, 5-12. TELEGRAPHS.

STATE TREASURER: Breach of official bond. See OFFICERS, 5, 6.

STATUTE OF FRAUDS. See CONTRACTS, 1. SALES, 1. VENDOR AND PURCHASER, 1, 2, 6.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES.

Constitutionality. See CONSTITUTIONAL LAW. COUNTIES, 1-6. STREET RAILWAYS, 4, 5. TAXATION, 1, 3, 8. TELEGRAPHS. WATER POWERS.

Construction. See APPEAL, 2, 3, 5. AUTOMOBILES, 1. CHATTEL MORTGAGES, 2, 3. COMMERCE, 2. CONTRACTS, 1. COSTS, 2, 5. COUNTIES, 3, 7, 8. COURTS, 4-6. CRIMINAL LAW. DEPOSITIONS, 1-3. DISCOVERY. DIVORCE, 1, 5. DRAINS. EXECUTORS, 4. HIGHWAYS. INSURANCE, 1, 8, 12. INTOXICATING LIQUORS. JUDGMENT, 3-5, 9, 13, 14. LIBEL AND SLANDER, 1. LIMITATION OF ACTIONS. MARRIAGE. MASTER AND SERVANT, 6-12, 17. MECHANICS' LIENS. MUNICIPAL CORPORATIONS, 1, 2, 7, 9. OFFICERS, 1, 2, 5, 7. PLEADING, 3. PUBLIC UTILITIES. RAILROADS, 2-9, 12, 14, 15. STREET RAILWAYS, 1-5. TAXATION, 1-3, 7-9, 12-16. TELEGRAPHS. TOWNS, 1. VENDOR AND PURCHASER, 1, 2, 6. VENUE. WATER POWERS, 2. WILLS, 4, 6, 18. WORKMEN'S COMPENSATION.

Same: Statutory method of determining fact.

Where the statute designates a method by which a certain fact is to be determined or ascertained, such method is exclusive. *State ex rel. Owen v. McIntosh,* 596

Repeal. See COUNTIES, 5.

State and federal statutes. See MASTER AND SERVANT, 5-12. TELEGRAPHS.

STEP-LADDER: Defective construction: Injury: Liability of manufacturer. See NEGLIGENCE, 1, 2.

STOCK AND STOCKHOLDERS. See CONSPIRACY.

STREET AND INTERURBAN RAILWAYS.

Keeping streets in repair: Repaving: Validity of city ordinance.

1. The duty imposed by a city ordinance upon a street railway company to keep "in proper repair," without qualification, that part of a street which is within the railway zone, is broad enough to

require paving and repaving with the same material of which the remainder of the street is composed. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 230

2. A city ordinance directing a street railway company "to do away with the bad condition of its railway zone . . . , by paving the same with standard asphalt upon a concrete foundation, all of the same kind, character, and specifications as that recently laid by" the city "outside of the railway zone," is a reasonable rule or regulation within the meaning of sec. 1862, Stats., which provides that street railway companies shall be "subject to such reasonable rules and regulations" as the municipal authorities may from time to time prescribe. *Ibid.*

3. The power of a city to require a street railway company to repair its railway zone in a street is a police power, legislative and regulative in character, and cannot be contracted away; hence an ordinance changing or enlarging the duty in that respect imposed upon the company by a prior ordinance does not impair the obligation of a contract. *Ibid.*

4. An ordinance of that nature, otherwise reasonable, will not be held invalid on the ground that compliance with it would unreasonably reduce the earning capacity of the company below a reasonable return on the investment, since the company can at any time apply to the railroad commission and have the rates of fare made reasonable. *Ibid.*

5. Nor does such an ordinance deprive the company of property without due process of law or deny to it the equal protection of the laws, in violation of sec. 1, art. XIV, Amendm. Const. of U. S. *Ibid.*

Injuries to passengers. See CARRIERS, 3. LIMITATION OF ACTIONS, 4. WITNESSES.

Injury to person working near track: Contributory negligence.

6. In an action for injuries to a laborer who was struck by a street car while shoveling dirt into a wagon from a shallow excavation close to the track, upon evidence showing, among other things, that his work did not necessitate his actual entry into the pathway of the car, that he was injured by a car coming from the direction in which he was facing, and that he had an opportunity of looking every time he raised his shovel to the wagon, but never looked more than about a dozen feet in that direction, and in view of the fact that the car was running upon tracks from which it could not deviate and the very presence of which constituted a warning of probable danger, it cannot be said that the trial court was clearly wrong in holding that plaintiff was guilty of contributory negligence as a matter of law. *Bubb v. Milwaukee E. R. & L. Co.* 338

Duty of driver of automobile to stop before passing street car. See AUTOMOBILES, 1–4.

STREET LIGHTING. See MUNICIPAL CORPORATIONS, 3, 4, 7. PUBLIC UTILITIES.

STREETS AND ALLEYS. See AUTOMOBILES. BRIDGES. DEDICATION. ELECTRICITY. HIGHWAYS. JUDGMENT, 14–16. MUNICIPAL CORPORATIONS, 8–15. NAVIGABLE WATERS, 2. PLATTING LANDS. RAILROADS, 2–6.

SUMMONS: Service. See DISCOVERY. LIMITATION OF ACTIONS, 4.

SUNDAY.

A note given on Sunday to take up a note previously given is ineffectual to discharge the indebtedness on such prior note. *Becker v. Noegel,* 73

SUPREME COURT. See APPEAL AND ERROR. COURTS, 2–4.

SURFACE WATER. See MUNICIPAL CORPORATIONS, 12.

SURRENDER of securities deposited with state treasurer: Liability. See OFFICERS, 5, 6.

SURVIVORSHIP. See HUSBAND AND WIFE, 3.

SUSPENSION of exercise of right under franchise. See PUBLIC UTILITIES, 5, 6.

TAXATION.

Occupation taxes: Grain elevators: Exemptions: Constitutional law.

1. Ch. 209, Laws 1915,—providing (sec. 1057*m*) that "every person . . . or corporation operating a grain elevator or warehouse in this state, except elevators and warehouses on farms for the storage of grain raised by the owner thereof, shall . . . pay an annual occupation tax of a sum equal to one quarter of one mill per bushel upon all wheat and flax and one eighth of one mill per bushel upon all other grain received in or handled by such elevator or warehouse during the preceding year ending April thirtieth; and such grain shall be exempt from all taxation, either state or municipal,"—imposes, not a property tax, but an occupation tax, within the meaning of sec. 1, art. VIII, Const. *State ex rel. Bernhard Stern & Sons v. Bodden,* 75

2. The provision that "such grain shall be exempt from all taxation" was intended to exempt, in consideration of the payment of the occupation tax, only grain actually in the elevators on May 1st of each year, and not to exempt grain then in the possession of others, although it might at some time during the year be handled in such elevators or warehouses. *Ibid.*

3. Under sec. 1, art. VIII, Const., "reasonable exemptions may be provided;" and the grain handled in public elevators and warehouses, being a commodity in transit from place to place in the channels of trade and much of it in such transit from state to state, constitutes a different class of property, for the purposes of local taxation, from the grain stored in private warehouses by the producer. The exemption of the one and denial of such exemption to the other, as provided in ch. 209, Laws 1915, are based therefore upon legitimate classification, and do not constitute an unjust discrimination or denial of the equal protection of the laws. *Ibid.*

Exemptions: Omissions of taxable property: Invalidating levy.

4. Where the taxing officers of a city properly assessed certain property, and a tax was levied against it and the proper officers directed to collect the tax, the fact that the city council adopted a resolution exempting that property and that the city treasurer was directed to and did pay the tax thereon for that year did not invalidate the whole tax levy. *Borgman v. Langlade County,* 442

[5. Whether an intentional omission of any piece of taxable property will in all cases render the whole tax levy invalid, is not decided.] *Ibid.*

Assessment: Board of review: Valuation fixed.

6. Evidence, including a photographic reproduction of the assessment roll, is *held* to sustain a finding by the trial court that the board of review, after a hearing, had fixed the valuation of plaintiff's land, exclusive of buildings, at $14,870, and not at $12,870 as claimed by him. *Borgman v. Langlade County,* 442

Same: Reassessment by order of tax commission.

7. Sec. 1087—45 *et seq.*, Stats.,—providing that when the assessment of property in any district "is not in substantial compliance with law," etc., the tax commission may order a reassessment to be made and reviewed by persons appointed by the commission,—aims to correct substantial violation of the assessment laws by whomsoever committed. It authorizes a reassessment where an unjust and unequal assessment was made by the local assessor, even though, no complaint having been made to the board of review, that board was not called upon to review such assessment and consequently did not in any way violate its duty in the matter. *Culliton v. Bentley,* 262

8. The legislature had power to grant such authority to the tax commission. *Ibid.*

Recovery of illegal taxes paid: Limitation of actions: Judgment.

9. Where, in an action to recover illegal and excessive taxes paid to a city, the plaintiff, upon being required to bring in other parties defendant, amended the complaint accordingly, but stated identically the same cause of action against the city as was before stated, the action against the city is not barred by the mere fact that the amended complaint was served and the new parties brought in after the year limited by sec. 1164, Stats., for the bringing of the action. *Burkhardt M. & E. P. Co. v. Hudson,* 412

10. The right of plaintiff to recover in this action having been established, the amount of recovery being merely a matter of computation, and the case having been twice before the circuit court and twice before the supreme court, the latter court, upon affirming an order overruling a demurrer to the amended complaint, directs a judgment for the plaintiff upon such complaint. *Ibid.*

Tax titles: Tenants in common.

11. One tenant in common of unoccupied lands may acquire the title of his cotenant by tax deed, where they derived their interests under separate instruments and there was no relationship between them other than that of mere tenancy in common. *Hobe v. Rudd,* 152

Same: Description of land: "Undivided one-half."

12. Where a tax deed purported to convey an "undivided one-half" of certain land, reference might be had to the proceedings upon which the tax sale was based in order to ascertain which particular undivided half was sold; and where it appeared therefrom that the grantee in the tax deed as owner of one undivided half of the land had paid the taxes thereon, it necessarily followed that the other undivided half was what was sold and the description in the tax deed was sufficiently certain under sec. 1047, Stats. *Hobe v. Rudd.* 152

Same: Mistake in description: Refunding amount paid.

13. An erroneous description of land in the assessment and tax rolls and also in the tax certificate issued upon a sale for nonpay-

ment of the tax was a mistake affecting the groundwork of the tax, and the county board was authorized, under sec. 1184, Stats., to refund to the purchaser the amount paid by him at such tax sale, and to reassess the tax under sec. 1186. *Borgman v. Langlade County,* 442

14. The fact that the county board in such a case refused to refund until ordered to do so by the circuit court did not affect its authority or duty to do so. *Ibid.*

Same: Possession by original owner.

15. Under secs. 1187, 1188, Stats., where the original owner of land sold for taxes continues in the occupancy and possession thereof for three years after the recording of the tax deed, such deed is void; and the possession of a part of the premises is possession of the whole. *C., St. P., M. & O. R. Co. v. Bystrom,* 125

Same: Notice by tax-deed grantee to owner.

16. That part of sec. 1189, Stats., as amended by ch. 440, Laws 1913, beginning "The tax deed grantee or his assigns may, at any time after the tax deed is issued and recorded, serve a notice on the owner," etc., does not relate to all tax deeds, but applies only to cases where, as stated in the preceding clause, "a single tax deed only has been issued and the original owner has, before the issuance of such tax deed, paid all taxes levied against the land for the three years ensuing after the year for which the land was returned delinquent and sold." *Hobe v. Rudd,* 152

Quieting title against tax-title claimant. See JUDGMENT, 8, 9.

TAX COMMISSION. See TAXATION, 7, 8.

TAXPAYERS' ACTION. See COURTS, 6. OFFICERS, 8. SCHOOLS, 3.

TAX TITLES. See JUDGMENT, 8, 9. TAXATION, 11–16.

TELEGRAPHS.

Negligence in delivery of telegram: Damages: Mental anguish.

1. Sub. 5, sec. 1778, Stats. (Laws 1907, ch. 165), giving a right to recover for mental anguish resulting directly from failure or negligence in delivering a telegram, was a valid exercise of the legislative power; but since Congress has, by the act of June 18, 1910 (36 U. S. Stats. at Large, 539, ch. 309), taken exclusive control of interstate telegraph business, no rights of action based upon such state legislation can arise as to that business except so far as they may be recognized by federal law or decisions. *Durre v. Western Union Tel. Co.* 190

2. Since the federal law still recognizes the common-law doctrine that mental anguish, except in cases affecting the liberty, character, reputation, personal security, or domestic relations of the party injured, cannot be the basis of an action and that such doctrine of nonliability applies in cases arising from negligence by a telegraph company in delivering messages, there can be no recovery under said sub. 5, sec. 1778, Stats., for mental anguish arising from delay in delivering interstate telegrams. *Ibid.*

TELEPHONES: Evidence of conversation. See EVIDENCE, 1.

TENANCY BY ENTIRETIES. See HUSBAND AND WIFE, 3.

TENANCY IN COMMON. See TAXATION, 11.

TESTAMENTARY CAPACITY. See WILLS, 1, 2.

TESTAMENTARY TRUSTS. See WILLS, 9.

TIME.
Computation. See COUNTIES, 7, 8.
For taking depositions: Fixing. See DEPOSITIONS, 6.

TITLE.
To land. See BRIDGES. CANCELLATION OF INSTRUMENTS. COUNTIES, 1–6. DEDICATION. DEEDS. DEPOSITIONS, 2–4. EASEMENTS. JUDGMENT, 8, 9. NAVIGABLE WATERS. PLATTING LANDS. RAILROADS, 2–6. TAXATION, 11–16. VENDOR AND PURCHASER.
To personal property. See BILLS AND NOTES, 1, 2, 4. CHATTEL MORTGAGES. COMMERCE, 1. HUSBAND AND WIFE, 2, 3. SALES, 3–5. TROVER AND CONVERSION. TRUSTS AND TRUSTEES.

TORTS. See AUTOMOBILES. CARRIERS, 3. CONSPIRACY. CORPORATIONS. DAMAGES, 2–6. ELECTRICITY. HIGHWAYS. HOSPITALS. LIBEL AND SLANDER. LIMITATION OF ACTIONS, 2–4. MASTER AND SERVANT, 3–17. MUNICIPAL CORPORATIONS, 12–15. NEGLIGENCE. NUISANCE. PHYSICIANS AND SURGEONS. RAILROADS, 2–16. STREET RAILWAYS, 6. TELEGRAPHS. TRIAL, 1. TROVER AND CONVERSION. WITNESSES.

TOWNS.

See DRAINS. HIGHWAYS. OFFICERS, 7, 8.

1. The words "other charges and expenses of the town" in sub. (1), sec. 776, Stats., mean only other *lawful* charges and expenses. *Humboldt v. Schoen,* 541
2. When facts showing an unlawful expenditure of the town's money are pleaded, damage is sufficiently made to appear. *Ibid.*

TRANSACTIONS WITH PERSONS SINCE DECEASED. See DEPOSITIONS, 5. EXECUTORS, 1.

TRESPASS. See RAILROADS, 2–6.

TRIAL.

Place of trial. See VENUE.

Pleadings: Filing or amendment at trial. See PLEADING, 2, 3.

Evidence: Objections: Waiver. See EVIDENCE, 2.

Arguments of counsel: Curing error. See CRIMINAL LAW, 4.

Right to trial by jury. See JURY.

Questions for jury. See APPEAL, 7. ASSAULT, 3. AUTOMOBILES, 3, 4. LIBEL AND SLANDER, 2, 3. MASTER AND SERVANT, 13, 15. MUNICIPAL CORPORATIONS, 15. RAILROADS, 14, 16. STREET RAILWAYS, 6. TROVER AND CONVERSION.

Instructions to jury. See ASSAULT, 2. CRIMINAL LAW, 4. DAMAGES, 2. TRIAL, 1.

Verdict: Direction of. See MUNICIPAL CORPORATIONS, 15.

Special verdict: Form: Separate questions.

1. In an action for injuries sustained in stepping upon a rusty nail it was not error to refuse to submit to the jury a separate question as to whether the application by plaintiff of plantain leaves to his foot had caused an increase or spreading of the infection, where the court instructed the jury that it was plaintiff's duty to make his injuries as little as possible by exercising ordinary care, and if they found that he failed to exercise such ordinary care by using plantain leaves and that thereby his injuries were

increased they should omit and exclude from the damages such injuries as resulted from the use of plantain leaves. *Kielar v. Fred Miller Brewing Co.* 237

Same: Changing findings of jury.

2. Findings in a special verdict in an action of replevin are *held* to be supported by the evidence, and it was error for the trial court to change them. *Alderson v. Carmody,* 346

Trial by court: Findings: Supplying omissions on appeal. See APPEAL, 6.

TROVER AND CONVERSION.

See CORPORATIONS.

Whether certain timber found floating in Lake Superior and alleged to have been converted by defendants belonged to the plaintiff is *held,* upon the evidence, to have been a question for the jury. *Russell T. Co. v. Kenfield-Lamoreaux Co.* 136

TRUST COMPANIES: Dissolution: Premature surrender, by state treasurer, of securities: Liability. See OFFICERS, 5, 6.

TRUSTS AND TRUSTEES.

See DIVORCE, 6. WILLS, 9.

1. A trust in personal property may be created by parol, but the evidence to establish it must be clear and convincing and must consist of something more than loose conversations with third parties. *Dupont v. Jonet,* 554

2. Thus, in an action by the administrator of a husband's estate against the administrator of the wife's estate, to recover certain securities which originally belonged to the husband and were alleged to have been transferred to the wife under a trust agreement by which she was to have the use of such securities during her life and upon her death to give them to his children by a former marriage, evidence of statements said to have been made by the wife in casual conversations with her friends was too vague to establish the making of any such agreement or the creation of any trust. *Ibid.*

UNDERTAKING on appeal. See APPEAL, 5.

UNDUE INFLUENCE. See WILLS, 1.

VALUE of property on trading basis not conclusive. See EXCHANGE OF PROPERTY.

VARIANCE. See PLEADING, 3.

VENDOR AND PURCHASER OF LAND.

See BROKERS. EXCHANGE OF PROPERTY.

Requisites and validity of contract.

1. A contract for the sale of land which clearly appears from several writings considered together satisfies the statute of frauds and may be specifically enforced. *Heins v. Thompson & Flieth L. Co.* 563

2. The signing of such a contract in the name of the vendor by his authorized agent is sufficient under sec. 2304, Stats. *Ibid.*

3. Where, upon accepting an offer for the sale of lands at a certain price, the purchaser directs the vendor to send on formal contracts and abstracts of title, and after receiving such papers retains them for months without objection and also makes a payment thereon, this is such an acceptance and adoption of the contracts as gives them validity although they are signed only by the vendor; and such acceptance and assent to the terms of the contracts also supplies any previous want of a specific agreement as to the terms of payment for the land. *Ibid.*

4. Where parties competent to contract have made an agreement for the purchase and sale of lands which is reasonably certain in all its parts and not objectionable for unfairness or inequity, the specific performance thereof is a matter of right and not of judicial discretion. *Ibid.*

5. In an action by the vendor to enforce specific performance of alleged contracts for the purchase of land, the evidence is *held* to show that certain defendants dealt with plaintiff in the matter not in their individual capacities but on behalf of the defendant corporation, of which they were officers, and that the contracts were not made with them as purchasers but with said corporation. *Ibid.*

Construction of contract: Parol evidence.

6. Where, in a writing stating the terms of a sale of land, the vendor agreed that in conveying title he would stipulate in the mortgage for the release of any given lot or lots "upon payment to me of such a sum as may be hereafter agreed upon by us as being equitable," an agreement as to the amounts to be paid for releases was a condition precedent to the completion of the contract and to its validity under the statute of frauds (sec. 2304, Stats.); and upon a failure of the parties to agree upon that matter the vendee was entitled to recover back the earnest money paid by him. *Carlock v. Johnson,* 49

7. The admission of evidence of the circumstances characterizing the making of such writing and the subsequent treatment of it by the parties was not error; for, if the meaning of the language was not plainly as above stated, such evidence was admissible for the purpose of clearing up the obscurity. *Ibid.*

Same: Rescission: Notice.

8. Under a land contract providing that the vendor would "any time before January 1, 1914, at the express option of the [vendee] and within thirty days of written notification by him," refund to said vendee the money paid by him and cancel the contract, the vendee did not need to give the notice of rescission thirty days before January 1, 1914, but might do so at any time before that date. *Guild v. Deniston,* 123

Rights and liabilities of parties: Remedies: Specific performance.

9. Where the vendee in a land contract would have a right to compel specific performance, the vendor has a like right. *Heins v. Thompson & Flieth L. Co.* 563

10. The vendor's right to enforce payment of the purchase money under a land contract should, as a general rule, be enforced by sale of the land to satisfy his claim, with a judgment for the deficiency, if any, enforceable by execution, or by a resort to the remedy of strict foreclosure; and unless there are special

circumstances showing that such remedies will not fully protect the vendor's right, the court should not render judgment in such form that payment by the vendee might be enforced by a contempt proceeding. *Ibid.*

Breach by vendor: Damages.

11. Where the vendor fails to perform an executory land contract, having agreed to do what he had no right to do, taking his chances upon being able to acquire such right, he is guilty of a species of bad faith and is liable to make good to the opposite party the damages caused to him by the loss of his bargain. *Lommen v. Danaher,* 15

Exchange of lands. See BROKERS, 2. EXCHANGE OF PROPERTY.

VENUE.

See CRIMINAL LAW, 1, 2.

Change of venue: Right is statutory.

1. The right to a change of venue exists in this state only by virtue of the statute, and such change can be had only upon the terms prescribed. *State ex rel. Carpenter v. Backus,* 179

Where cause of action arises: Life insurance policy.

2. Life insurance policies were issued and were payable in M. county, in which the insurance company (a domestic corporation) had its principal office. The insured resided at the time, and until his death, in W. county. Notice and proofs of death were to be furnished to the company in M. county, and were in fact drawn in W. county and mailed there to the company in M. county. An administrator of the estate of the insured was appointed in W. county. *Held,* that an action upon the policies was properly triable in M. county, under sub. 5, sec. 2619, Stats., no part of the cause of action having arisen in W. county. *State ex rel. Northwestern M. L. Ins. Co. v. Circuit Court,* 387
3. As to the proofs of death, the act essential to a recovery was not the drawing or mailing of them in W. county, but the service of them on the company, and this took place in M. county. *Ibid.*
4. The appointment of the administrator was not an essential part of the cause of action; it merely designated the person who was to enforce it. *Ibid.*
5. Although a cause of action does not "accrue" until there is a person in existence with a present right to sue upon it, a cause of action may logically be said to "arise" when the facts necessary to demonstrate the defendant's breach of duty and liability to some person or group of persons or interests have all come into existence, even though the person or group be not at the time competent to sue. *Ibid.*

VERDICT. See TRIAL.

VESTED RIGHTS. See INSURANCE, 8–13.

VESTING of estates. See WILLS, 9, 10.

VIADUCTS. See MUNICIPAL CORPORATIONS, 8–11. RAILROADS, 1.

VILLAGES. See INTOXICATING LIQUORS, 1–5. MUNICIPAL CORPORATIONS, 5, 6, 12–14.

VOLUNTARY APPEARANCE. See APPEARANCE.

WAIVER.
Of claim against decedent. See BILLS AND NOTES, 3.
Of claim under accident policy. See INSURANCE, 4.
Of objections to evidence. See JUDGMENT, 11.
Of defense. See LIMITATION OF ACTIONS, 5, 6.
Of right to sue for damages. See RAILROADS, 3.
Of right to recover for injuries. See RAILROADS, 8.
Of performance of contract. See SALES, 2.
Of objection to proceeding. See WORKMEN'S COMPENSATION, 16.

WARNING servant. See MASTER AND SERVANT, 15.

WATER POWERS.

1. The Water Power Act of 1913 (ch. 755, Laws 1913; secs. 1596—50 to 1596—79, Stats. 1913), which, among other things, empowers the railroad commission "to regulate and control the level and flow of water in all navigable waters" of the state, was intended as a complete scheme for the control and supervision of dams, modifying, in so far as it conflicted therewith, franchises previously granted; and, by reason of its failure to give some of the parties adversely affected the right to test in the courts the validity of orders of the commission—compliance with which may mean practical confiscation of property, while for refusal to comply heavy penalties may be imposed,—the act is unconstitutional in that it permits the taking of private property without compensation and without due process of law, and in that it fails to give all parties similarly situated the equal protection of the laws. *State ex rel. Owen v. Wis.-Minn. L. & P. Co.* 430
2. The term "grantee" being defined in sub. (8), sec. 1596—50, as the grantee of a franchise under said ch. 755, one who maintains and operates a dam under a franchise granted by a prior act of the legislature is not one of the parties, designated in sec. 1596—76, who are given a right to review orders of the commission. *Ibid.*

[3. Whether said ch. 755 should be declared unconstitutional because of the heavy penalties provided for, is not determined.] *Ibid.*

WATERS AND WATERCOURSES. See BRIDGES. MUNICIPAL CORPORATIONS, 12. NAVIGABLE WATERS. WATER POWERS.

WILLS.

Testamentary capacity: Evidence.

1. Findings by the trial court in this case that the testatrix had testamentary capacity, understood the contents of the will, and did not act under any undue influence, are *held* to be sustained by the evidence. *Will of Griffith,* 601
2. The fact that property of the testatrix, consisting of a lot in Milwaukee at 488 Van Buren street, was, by mistake of her nurse who wrote the will, described therein as 480 acres on Van Buren street, was immaterial. *Ibid.*

Contract to devise land: Oral promise. See CONTRACTS, 1.

Deed intended to take effect after death: Delivery. See DEEDS, 1, 2.

Execution: Presumptions: Statutory regulations.

3. The appearance, on the face of a will, of regularity raises a presumption of due execution which should prevail in the absence

of clear and satisfactory evidence to the contrary. *Will of Griffith,* 601

4. The statutory regulations as to the execution of wills are intended to conserve the inherent right to dispose of property by will and should be administered so as to effect that purpose and not to defeat the right. Mere informality, where the essentials required are substantially satisfied, is immaterial. *Ibid.*

Same: Attestation: Request: Order of signing.

5. An express request by the testator that the witnesses sign his will is not essential, an implied request or an assent to the signing being sufficient. *Will of Griffith,* 601
6. A formal attestation certificate or clause is not required by the statute (sec. 2282, Stats.) and is unnecessary. *Ibid.*
7. Although the better way is for the witnesses to a will to sign after the testator has signed, that order of signing is not essential to the validity of the will if all sign when all are present and as part of one continuous transaction. *Ibid.*

Construction: Description of property. See WILLS, 2.

Same: Nature of estates and interests created.

8. That part of a will whereby the fee of all testator's real estate was devised to his son was revoked by a codicil in which said real estate was devised to the son "for his sole use and purpose during the term of his natural life providing there be no issue, then said real estate to be sold and the proceeds to be equally divided between my grandchildren share and share alike." *Held,* that testator's intention was to give the real estate absolutely to the son in case he had issue, and if not, to give him merely a life estate. *Will of Smith,* 207
9. Under the terms of a will giving one fourth of the residue of testator's estate to each of his two sons and the other half in trust for the benefit of his two daughters, with a provision disposing of a possible residue of such trust estate, it is *held* that the children of the testator did not take any vested interest in the *corpus* of the trust estate at the death of the testator; that but one trust was created, which was to continue until the death of both daughters and until their issue, if any, attained the age of twenty-one; and hence that one of the daughters could not by will dispose of her interest in the trust estate. *Will of Elmore,* 266
10. The law favors an early vesting of estates—but not contrary to the intention of the testator. *Ibid.*

Same: Precatory words: Life estate: Conditional remainder: Omission of person.

11. Where it is necessary to follow precatory words in a will in order to carry out the testator's clear intention, such words are not advisory but mandatory. *Will of Olson,* 409
12. A will giving all of testator's "real and personal property" to his wife "with full power and control of the same," stated that "after the death of my said wife it is my wish that what remains of the property shall be divided equally between my three sons [naming them], upon the express condition that my said sons shall during the lifetime of my said wife assist her in operating the farm and taking care of the property, also to pay

to each of my four daughters" and another son certain legacies in cash. *Held*, that the wife took a life estate coupled with the power to dispose of the *corpus* of the property if necessary for her maintenance, with remainder over to the sons named upon the condition specified. *Ibid.*

13. The condition that the sons should assist the mother during her life is not so vague that a court cannot determine the question of its performance; and in an action to construe the will, brought after her death, the evidence is *held* to sustain a finding that such condition had been complied with. *Ibid.*

14. A further finding in such action that a granddaughter was intentionally omitted from the will is *held* to have sufficient support in the evidence. *Ibid.*

Same: Gift to "wife" who is not wife: Limitation.

15. A gift by will "to my wife," where there is no doubt as to the person intended, is a good gift even though such person was not the wife of the testator. *Will of Weymouth*, 455

16. A will, dictated and executed by testator during his last illness, provided that all of his property should "go to my wife E. W. so long as she shall remain single. In case of her marriage she shall have the homestead . . . , and one third of all other property . . ." E. W. was not the testator's wife, but had lived with him and been recognized as such for about nineteen years. She had previously been married to one G., who was still living, and they had never been divorced. Testator knew of that marriage and that G. might be living, but believed him to be dead. *Held*, that E. W. was testator's wife, within the terms of the will,—his intention, and what he meant by the phrase "so long as she shall remain single," being that all the property should go to E. W. so long as she should maintain, after his death, the status which she occupied at the time the will was made, *i. e.* so long as she did not again marry or return to G. as his wife. *Ibid.*

17. Under such will E. W. took, not merely a life estate, but absolute title to all the property, subject only to the limitation stated. *Ibid.*

Costs: Compensation to guardian ad litem.

18. No costs and no compensation payable out of the estate (under secs. 4041*a*, 4041*b*, Stats.) are allowed in the supreme court in this case to the guardian *ad litem* of unsuccessful contestants of a will; nor are costs awarded against such guardian or those whom he represents. *Will of Griffith*, 601

WITNESSES.

Competency. See DEPOSITIONS, 5. EXECUTORS, 1.

Credibility.

In an action for injuries sustained by a passenger in alighting from an interurban car, it was error to exclude court records offered in evidence to show, as bearing on plaintiff's credibility, that she had pleaded guilty to a charge of drunkenness and disorderly conduct; but the trial court having reduced the jury's award of damages from $3,250 to $1,250, the justices of this court participating in the decision are equally divided on the question whether such error was prejudicial. *Maxwell v. Johnson*, 462

WORDS AND PHRASES.
Abandonment, in statute. See PUBLIC UTILITIES, 7, 8.
Accrue. See VENUE, 5.
Action to recover damages for an injury to the person, in statute. See LIMITATION OF ACTIONS, 3.
Additional burden. See MUNICIPAL CORPORATIONS, 11.
Adverse party, in statute. See WORKMEN'S COMPENSATION, 27.
Alimony, in statute. See DIVORCE, 2.
Arise, in statute. See VENUE, 2–5.
Attest. See BANKS AND BANKING, 1.
Charges and expenses of town, in statute. See TOWNS, 1.
Compliance with law, in statute. See TAXATION, 7.
Corporate powers, in constitution. See COUNTIES, 4.
Correct: Attest. See BANKS AND BANKING, 1.
Counterclaim. See JUDGMENT, 9.
County government, in constitution. See COUNTIES, 2.
Depot grounds, in statute. See RAILROADS, 15.
Earning capacity, in statute. See WORKMEN'S COMPENSATION, 20.
Final division of estate, in statute. See DIVORCE, 2.
Final hearing. See WORKMEN'S COMPENSATION, 23.
For or in or about the erection, etc., in statute. See MECHANICS' LIENS, 1, 2.
General appearance. See APPEARANCE, 2, 3.
Granted, in statute. See PUBLIC UTILITIES, 2.
Grantee, in statute. See WATER POWERS, 2.
Gross negligence. See NEGLIGENCE, 4, 5.
In any town, in statute. See HIGHWAYS, 1.
Injury to the person, in statute. See LIMITATION OF ACTIONS, 3.
Innocent purchaser. See CANCELLATION OF INSTRUMENTS, 3.
Interstate commerce. See COMMERCE, 1. MASTER AND SERVANT, 8–10. WORKMEN'S COMPENSATION, 13, 14.
Lease, in statute. See MECHANICS' LIENS, 3.
License, permit or franchise, in statute. See PUBLIC UTILITIES, 4.
Majority vote of all members, in statute. See INTOXICATING LIQUORS, 7.
Member of the family, in statute. See WORKMEN'S COMPENSATION, 21.
Mistake affecting groundwork of tax, in statute. See TAXATION, 13.
Notice of injury. See LIMITATION OF ACTIONS, 4.
Occupation tax, in constitution. See TAXATION, 1.
Ordinary negligence. See NEGLIGENCE, 3.
Other charges and expenses of the town, in statute. See TOWNS, 1.
Other suitable employments, in statute. See WORKMEN'S COMPENSATION, 18, 20.
Owner's risk, in bill of lading. See CARRIERS, 1, 2.
Paid in money, in policy. See INSURANCE, 14.
Party to action. See APPEAL, 5.
Passenger, in statute. See AUTOMOBILES, 1.
Performing service growing out of and incidental to his employment, in statute. See WORKMEN'S COMPENSATION, 1–5.
Permanently established grade, in statute. See MUNICIPAL CORPORATIONS, 9.
Proceeding, in statute. See DISCOVERY.
Proper repair, in ordinance. See STREET RAILWAYS, 1.
Proximately caused by accident, in statute. See WORKMEN'S COMPENSATION, 6, 7.
Public utility, in statute. See PUBLIC UTILITIES, 1.

Reasonable regulations, in statute. See STREET RAILWAYS, 2.
Referred to a committee, in rule of county board. See COUNTIES, 9.
Remain single, in will. See WILLS, 16.
Repair. See STREET RAILWAYS, 1.
Road, in statute. See RAILROADS, 12.
Simple tool. See MASTER AND SERVANT, 15, 16.
Single, in will. See WILLS, 16.
Sole and unconditional ownership, in policy. See INSURANCE, 2.
Solicit or place insurance, in statute. See INSURANCE, 1.
Special appearance. See APPEARANCE, 2, 3.
Sufficient cause, in statute. See DEPOSITIONS, 3.
Suspension of exercise of right, in statute. See PUBLIC UTILITIES, 5.
Ten days prior to the sale. See COUNTIES, 7.
True and fair report of a judicial proceeding, in statute. See LIBEL AND SLANDER, 1.
Undivided one-half, in tax deed. See TAXATION, 12.
Widow, in statute. See WORKMEN'S COMPENSATION, 21.
Wife. See WILLS, 15–17. WORKMEN'S COMPENSATION, 21.
Withdrawal, in statute. See WORKMEN'S COMPENSATION, 10.
Work, in city charter. See MUNICIPAL CORPORATIONS, 7.

WORKMEN'S COMPENSATION.

Conditions of liability: "Performing service growing out of and incidental to his employment."

1. An employee going in the usual manner for his pay to a place designated by the employer is performing a service within his employment. *Hackley-Phelps-Bonnell Co. v. Ind. Comm.* 586
2. Thus, where an employee of a logging company in one of its camps, being about to take a vacation, was given a time slip and was told to go, as was customary, by one of the company's logging trains to its office in a village some miles away to get his pay, and while riding on such train was accidentally injured, it is *held* that he sustained such injury while in the employ of the logging company and while "performing service growing out of and incidental to his employment," within the meaning of sub. (2), sec. 2394—3, Stats. *Ibid.*
3. Although the employee testified in such case that when he received his time slip he was through with his work until he should come back again, this evidently referred only to such manual labor as he had been doing for his employer and was not conclusive upon the question whether the relation of employer and employee terminated at that time. *Ibid.*
4. It being held that at the time of the accident the employee was acting within the scope of his employment as fixed by the contract and custom of the parties, it is unnecessary to consider what bearing, if any, the provision in sub. (2), sec. 2394—3, Stats., relating to employees going to and from their employment, has upon the case. *Ibid.*
5. An employee who, while eating his lunch in the factory of the employer in accordance with a custom tacitly consented to by the latter, was injured by a pile of crude rubber falling upon him, was at the time "performing service growing out of and incidental to his employment," within the meaning of sub. (2), sec. 2394—3, Stats. *Racine Rubber Co. v. Industrial Comm.* 600

Same: Injury "proximately caused by accident."

6. A hernia resulting from accidental straining of a muscle is "proximately caused by accident," within the meaning of sub. (3), sec. 2394—3, Stats., even though the employee was predisposed to such infirmity by reason of having a congenital hernial sac. *Casper Cone Co. v. Industrial Comm.* 255

7. A definite mishap to an employee, happening to him while performing service growing out of and incidental to his employment and proximately causing him physical injury and damaging results, is compensable under the Workmen's Compensation Act, even though he was physically unsound at the time and otherwise the results would not have been caused by the mishap. *Ibid.*

Election by employer: Withdrawal.

8. The legislature having, in sub. 2, sec. 2394—5, Stats., fixed the time before which notice of an election by an employer not to accept the provisions of the Workmen's Compensation Act must be filed, the courts are powerless to extend the time. *Great Northern R. Co. v. King,* 159

9. A notice of such an election which was dated August 30th, mailed September 2d, and received by the industrial commission September 3, 1913, was not filed prior to September 1, 1913, within the meaning of sub. 2, sec. 2394—5, Stats., and hence was not effective. *Ibid.*

10. Such ineffective notice of election cannot be construed as a withdrawal under the provision of said section which allows an employer to withdraw himself from the operation of the law at the end of the year. *Ibid.*

Election by employee.

11. Where, by virtue of sub. 2, sec. 2394—5, Stats. (ch. 599, Laws 1913), an employer became subject to the Compensation Act on September 1, 1913, an employee whose contract of hire was made prior to that date did not, under sub. (2), sec. 2394—8, without having given notice of his election, come under the provisions of the act until he had remained in the service of such employer for thirty days after said September 1st. *Wiesedeppe v. Zweifel,* 84

Who are employees: Independent contractor.

12. The fact that the compensation of a man subject to the general direction of an employer is fixed on the basis of the amount of work done rather than on the amount of time spent, is not controlling in determining whether he is an employee or an independent contractor. *Komula v. General A., F. & L. A. Corp.* 520

Employees not subject to act: Railway employees "engaged in interstate commerce."

13. To establish that a railway employee was, at the time of injury, "employed in interstate commerce," it must appear that he was at that time engaged in interstate transportation or in work so closely related to it as to be practically a part of it. *Great Northern R. Co. v. King,* 159

14. Where a railway company transacted both interstate and intrastate business, although the latter was trifling in amount, a janitor in its general office in this state who was injured while breaking up coal for the furnace was not at the time engaged in interstate commerce. *Ibid.*

Compensation increased by penalty: Failure to guard machinery: Proximate cause.

15. Within the meaning of sub. (5) (h), sec. 2394—9, Stats., an injury is caused by the failure of an employer to guard a machine in compliance with an order of the industrial commission, where that particular injury would not have been sustained by the employee if the machine had been guarded as required. Whether or not the failure to guard is the proximate cause of the injury, in the sense in which that term is used in the law of negligence, is immaterial. *Manitowoc B. Works v. Industrial Comm.* 592

Payment in gross: Total or partial disability: Waiver of objection.

16. At a hearing before the industrial commission within six months after an employee was injured it appeared that his condition was such that the extent of the injury could be as well determined at that time as after the lapse of the six months provided for in sub. (5) (1), sec. 2394—9, Stats. Defendant's counsel consented that a gross sum might be awarded at that time for a permanent partial disability, and made no objection to the proceeding or request for a postponement of the hearing if the relief demanded, namely, an allowance for a permanent total disability, was to be considered by the commission. *Held*, that there was in effect a waiver of objection to a determination at that time of the question whether or not the disability was permanent and total, and to an award of a gross sum accordingly. *McDonald v. Industrial Comm.* 372

Extent of disability: Measure of compensation: Impairment of wage-earning capacity.

17. Physical injury not diminishing wage-earning capacity did not entitle an injured employee to compensation under the Workmen's Compensation Act as it existed in 1913. *Johnstad v. Lake Superior T. & T. R. Co.* 499

18. Since the enactment of ch. 599, Laws 1913, amending sub. 2, sec. 2394—10, Stats. 1911, the nature and extent of the disability caused by an injury to an employee, as well as his compensation for such disability, are to be measured with reference to the impairment of his earning capacity in the employment in which he was working at the time of the accident "and other suitable employments." *McDonald v. Industrial Comm.* 372

19. A finding by the industrial commission in this case, confirmed by the circuit court, that by an injury to an employee who worked as a carpenter and laborer he had for all practical purposes lost the use of his legs at the hip and was permanently totally disabled, is *held* to be supported by the evidence. *Ibid.*

20. A man's wage-earning capacity, which is the foundation of the Workmen's Compensation Act, is to be distinguished from his capacity to make money in a business conducted under his supervision or direction and with the use or investment of other capital than that which arises from his own labor; hence the mere fact that an injured employee wished to have his award in a lump sum so that he might undertake some small business to be conducted by him and his wife, should not militate against his right to compensation for permanent total disability to carry on the work in which he was employed at the time of the accident or other suitable employment. *Ibid.*

Who are dependent: Lawful "wife:" "Member of the family."

21. It appearing that a claimant of compensation on account of the death of her alleged husband had married him in Indiana within one year after an Illinois judgment of divorce and in evasion and violation of that judgment and of an Illinois statute, and that she and the deceased had thereafter come to Wisconsin and had lived here as husband and wife until his death, but without any new contract of marriage, it is *held* that she was not the lawful wife, nor was she "a member of the family" of the deceased, within the meaning of the Workmen's Compensation Act (sub. 4, sec. 2394—10, Stats.). *Hall v. Ind. Comm.* 364

Hearing: Holding matter open: Adjournments.

22. There is no authority, in such a case, for holding the matter open or adjourning for any time other than for a reasonable time as provided in sec. 2394—16, Stats. *Johnstad v. Lake Superior T. & T. R. Co.* 499

Same: Final hearing: Award which may be judicially reviewed.

23. An order of the industrial commission finding that an injured employee had not suffered any impairment of his earning capacity after a certain date and that full compensation had been paid up to that date, but stating that, because he might suffer loss of earnings in the future on account of his disability, the case would be "left open for the statutory period until such contingency may arise," was a definite decision that up to the time of the hearing there was no ground for the allowance of further compensation; and it is *held* that there had been a final hearing and that the order or award was one which might be reviewed under sub. 1, sec. 2394—19, Stats. *Johnstad v. Lake Superior T. & T. R. Co.* 499

Award: How far final and conclusive.

24. So far as an award by the industrial commission under the Workmen's Compensation Act is against the contentions of either party it is conclusive and final unless that party brings his action to review it in that respect. *Great N. R. Co. v. King,* 159

Judicial review: Action: Jurisdiction: Service on "adverse party."

25. Strict compliance with the requirements of sec. 2394—19, Stats., is necessary to give the circuit court jurisdiction of an action to review an award made by the industrial commission under the Workmen's Compensation Act. *Gough v. Ind. Comm.* 632

26. Thus, unless the summons and complaint is served upon an adverse party within the twenty days limited by said section, the circuit court has no jurisdiction to proceed in any action which would necessarily affect the rights of such adverse party. *Ibid.*

27. Where the industrial commission wholly disallowed the claim of the widow of an employee who was accidentally killed, and awarded compensation to his mother instead, the mother was an adverse party to the widow within the meaning of sec. 2394—19, Stats., their claims being conflicting. *Ibid.*

Same: Supplying defect in findings.

28. A memorandum of decision made by the industrial commission as a basis for the more formal findings of fact may be referred to to supply a defect in the findings. *Manitowoc Boiler Works v. Industrial Comm.* 592

Indemnity insurance. See INSURANCE, 14. REFORMATION OF INSTRUMENTS, 2.

Ex. L. Ill.
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